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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 121.

JOHN H. McNEE, PLAINTIFF IN ERROR,

vs.

PETER J. DONAHUE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 26, 1888.

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1 No. 11107.

In the Supreme Court of the State of California.

JOHN H. McNEE, Appellant,
vs.
P. J. DONAHUE, Respondent.

Transcript on Appeal.

S. F. Leib, for appellant; Doyle, Barber, Galpin and Scripture, for respondent.

Endorsed: Filed June 18, 1885. J. W. McCarthy, clerk, by Frank Myers, deputy.

2 & 3 In the Superior Court of the County of Santa Clara, State of California.

JOHN H. McNEE, Plaintiff,
vs.
PETER J. DONAHUE, Defendant.

4 The plaintiff above named complains of the defendant above named, and for cause of action avers that on the 16th day of June, A. D. 1882, the plaintiff was and ever since has been and yet is the owner and entitled to the possession of that tract of land situate, lying, and being in the county of Santa Clara, State of California, and more particularly known and described as lots one and two of section 26, township 6 south, range 1 west, Mount Diablo meridian, containing $106\frac{84}{100}$ acres of land, according to United States survey.

That on the said 16th day of June, A. D. 1882, and while said plaintiff was the owner and entitled to the possession of said lands aforesaid, the said defendant wrongfully and unlawfully entered into and upon said lands and took possession thereof, and has ever since remained and yet remains in the wrongful and unlawful possession of said lands, excluding said plaintiff from every part thereof and wrongfully detaining and withholding the possession thereof from said plaintiff, to the plaintiff's damage in the sum of $5,000.

That the value of the use and occupation of said lands is and will continue to be the sum of $2,000 per annum.

Wherefore plaintiff prays judgment against said defendant for the possession of said lands and for the sum of $5,000 damages, and the further sum of $2,000 per annum for the value of the use
5 and occupation of said lands from June 16, 1882, until final judgment, and for all costs of suit.

S. F. LEIB,
Attorney for Plaintiff.

T. H. LAINE, *Of Counsel.*

(Duly verified.)

Endorsed: Filed Sept. 16, 1882. J. J. Sontheimer, clerk.

(Title of Court and Cause.)

Answer and Cross-Complaint.

The defendant amends his answer and cross-complaint herein and alleges as follows:

He denies that on the sixteenth day of June, 1882, or at any time, the plaintiff was or has since been the owner or entitled to the possession of the lands and premises described in the complaint or of any part thereof.

He denies that at the time in that behalf mentioned in the complaint, or at any time, he wrongfully or unlawfully entered into or upon or took possession of said lands or any part thereof, or that he remains in the wrongful or unlawful possession thereof or any part thereof, or that he wrongfully excludes the plaintiff therefrom or wrongfully detains or withholds from the plaintiff the possession of the same or any part thereof.

6 He denies that the plaintiff has sustained damages by reason of the matters alleged in said complaint, or of any thereof, in the sum of five thousand dollars, or in any other sum.

And he denies that the value of the use and occupation of said land is worth, or will continue to be worth, the sum of two thousand dollars per annum or any like sum, or any greater sum than four hundred dollars per annum.

Second. For a separate defense the defendant alleges as follows:

That by an act of Congress approved July 2d, 1862, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," the United States of America granted to the State of California one hundred and fifty thousand acres of land within said State, the proceeds whereof, when such lands should have been selected and sold by said State, were to be invested and the interest appropriated to the endowment, support, and maintenance of a college wherein the leading object should be the teaching of such branches of learning as related to agriculture and the mechanic arts.

That by an act of the legislature of the State of California approved March 23d, 1868, entitled "An act to create and organ-

7 ize the University of California," the State of California, in order to avail itself of the aforesaid grant made by the act of Congress last aforesaid, created a university called the University of California, to be under the control and charge of a board of directors to be known and styled "the regents of the University of California," and by an act of the legislature of said State of California, entitled "An act to provide for the management and sale of the lands belonging to the State," approved March 28th, 1868, it was enacted that the board of directors of Agricultural, Mining, Mechanical Arts college, meaning the said "the regents of the University of California" aforesaid, should have power to order the selection of the said 150,000 acres of land and to sell and dispose of the same at such a price and in such a manner as they should deem best for the interest of said university.

That thereafter and in pursuance of said statute the said the

regents of the University of California did order the selection of said lands with the purpose of selling and disposing thereof, and did order and direct that all applications for the purchase thereof or any part thereof should be accompanied by the affidavit of such applicant that there was no occupation of nor settlement upon the lands applied for other than by the said applicant.

8 That afterwards, to wit, on or about the tenth day of September, 1873, one William W. Johnston did make application to the said "the regents of the University of California" to purchase the land described in the complaint.

That such application was irregular and void in this, to wit, it was not accompanied by the affidavit of said applicant that there was no occupation of nor settlement upon said land other than by the said applicant, nor was such application accompanied by any affidavit of any such purport or effect.

That thereafter, to wit, in the month of November, 1874, the said parcel of land described in the complaint was certified over to the State of California by the Commissioner of the General Land Office of the United States and by the Secretary of the Interior.

And thereafter, to wit, on the first day of June, 1882, by its letters patent, bearing date that day, the United States of America granted and conveyed said land to the State of California.

That on or about the 24th day of April, 1879, the said William W. Johnston executed and delivered to the plaintiff an instrument, bearing date that day, whereby for the alleged consideration of five dollars, therein expressed, he purported to grant, bargain, sell, and confirm to the plaintiff the land described in the complaint and to assign to the plaintiff any certificate of purchase or

9 other evidence of title that had been issued or afterwards might issue to him for said land or any part thereof from the State of California or from the said University of California in pursuance of his said application to purchase the same.

That thereafter, to wit, on the 24th day of February, 1882, one J. Ham Harris, the land agent of said University of California, at the instance of the plaintiff and upon presentation by him of the aforesaid assignment by said Wm. W. Johnston to the plaintiff, with intent to carry out and render effectual the aforesaid void application by said Johnston for the purchase of said land, executed and delivered to the plaintiff a certificate certifying that, upon the presentation thereof to said board of regents of the university, said plaintiff would be entitled to a patent for said land.

That thereafter, to wit, on or about the seventeenth day of June, 1882, the governor of the State of California, under and by virtue of the aforesaid application made by Wm. W. Johnston for the purchase of said land, executed and issued to the plaintiff a patent, whereby the people of the State of California purported to grant the said last-mentioned land to him as assignee of said Wm. W. Johnston, under and in pursuance of said application for the

10 purchase thereof by said Johnston; and the plaintiff has no title or claim of title to the demanded premises other than

that deraigned from and through said patent from said State, hereinbefore mentioned.

That the said certificate of purchase and said patent so made and issued were founded upon and issued in pursuance of said void application to purchase by said Johnston, and were so issued and delivered without authority of law, and were and are void.

That long previous to said application by Wm. W. Johnston to purchase said land, to wit, in the year 1862, James Donahue, the father of the defendant, in good faith purchased the lands described in the complaint of the State of California, and paid the State therefor, and the State then and there granted the same to him and took and received the purchase price therefor, and said James Donahue thereupon, in the year 1862, under and in pursuance of such grant, entered into and took possession thereof.

That this defendant, by devise, descent, and mesne conveyances, has succeeded to and acquired all the right, title, and interest in and to said land which were so acquired by said James Donahue by virtue of his said purchase thereof from the State of California,

11 and he and the said James Donahue and those under whom this defendant claims have been in the open and notorious possession of said premises under and by virtue of said grant from the said State ever since the year 1862; all of which was well known to said Johnston at the time of his said application to purchase said lands, and was well known to the plaintiff when he acquired his said alleged title thereto and interest therein.

Third. And the defendant, seeking affirmative relief against the plaintiff affecting the property described in the complaint, files this his amended cross-complaint herein and alleges as follows:

That by an act of Congress of the United States, approved March 3rd, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," the United States of America granted to the State of California sections sixteen and thirty-six in every township within said State for the purposes of public schools; and said act provided that where any such sixteenth or thirty-sixth sections might be reserved for public uses or taken by private claims, other land should be selected by the proper authorities of said State in lieu thereof.

12 That thereupon, afterwards, the proper authorities of the State of California did, in pursuance of said grant and under and by virtue of said act of Congress, select the lands described in the plaintiff's complaint, to wit, lots one and two of section 26, township 6 south, range 1 west, Mount Diablo base and meridian, according to the United States Government surveys, situated in said county of Santa Clara, containing $106\frac{84}{100}$ acres, and other lands adjacent thereto, amounting in all to two hundred and twenty-five acres and $\frac{80}{100}$ of an acre, in lieu of the following land in the county of Santa Clara, State of California, to wit: The northwest quarter and north half of the southwest quarter of section sixteen, in township number six south, range one east, Mount Diablo base and meridian, according to the United States Government surveys,

containing two hundred and forty acres, which last-mentioned land, in lieu whereof the lands described in the complaint were so selected, was at the time of such selection covered and taken by a private claim—that is to say, it was then and still is included within the exterior limits of a Mexican grant known as the Milpitas rancho.

That thereupon, afterwards, the said lands described in the complaint were in the form and manner required by law listed and certified over to the State of California by the Government of the United States by its proper officers, to wit, the Commissioner of the General Land Office and the Secretary of the Interior.

13 And thereupon, in the year 1862, after the lands described in the complaint had been so selected by the State of California, the said State, for a good and valuable consideration to it paid therefor by James Donahue, sold the said lands to him, the said Donahue, who purchased and paid for the same in good faith.

That after the purchase of said lands by James Donahue, of the State as above mentioned, he departed this life, and the defendant, his son, by devise, descent, and mesne conveyances, has succeeded to and acquired all of the right, title, and interest in and to the lands described in the complaint which were acquired by or vested in said James Donahue under and by virtue of his said purchase from the State.

That on the twenty-third day of July, 1866, by an act of Congress of the United States of America, approved on that day, it was enacted that in all cases where the State of California had theretofore made selections of any portion of the public domain in part satisfaction of any grant made to it by any act of Congress, and had disposed of the same to purchasers in good faith under her laws the lands so selected should be, and thereby were, confirmed to said State.

And this defendant insists that by virtue of the matters hereinbefore alleged in this cross-complaint, and by virtue of said

14 last-mentioned act of Congress, the equitable title to said land vested in this defendant.

That thereafter, to wit, on the first day of June, 1882, the United States of America executed and delivered to the State of California its letters patent, bearing date that day, whereby the said United States of America granted and conveyed to the State of California the lands described in the complaint.

And this defendant claims and insists that on the execution and delivery of said letters patent the legal title to said land immediately vested in the State of California in trust for the defendant.

That after the execution and delivery by the United States of its said letters patent to the State of California for said lands, to wit, on the seventeenth day of June, 1882, the State of California executed and delivered to the plaintiff its letters patent bearing date that day, whereby it purported to grant and convey to the plaintiff the lands described in the complaint.

And it is under and by virtue of said letters patent only that the plaintiff claims to be the owner and to be entitled to recover the possession of said land.

That at the time of the execution and delivery of said letters patent to the plaintiff this defendant was in the actual, open, and notorious possession of said premises described therein, and
15 he and those through whom he devised his right thereto, as aforesaid, had been in the exclusive, open, and notorious possession thereof, claiming under the purchase thereof from the State of California by said James Donahue ever since such purchase; of all which the plaintiff at the time he purchased said lands, and at the time of the execution and delivery to him by the said State of its patent, as aforesaid, had notice.

Fourth. And further, and also by way of amended cross-complaint, the defendant alleges as follows:

By an act of Congress of the United States, approved September 4th, 1841, entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," the United States of America granted to each new State which should thereafter be admitted to the Union five hundred thousand acres of land for purposes of internal improvement, to be selected within the limits of such State in such manner as the legislature thereof should direct.

That upon admission of the State of California into the Union, to wit, on the 9th day of September, 1850, she became entitled under and by virtue of said grant to five hundred thousand acres of the public land of the United States, to be selected by her in such manner as her Legislature should direct.

16 That by act of the legislature of the State of California approved May 3d, 1852, entitled "An act to provide for the disposal of the five hundred thousand acres of land" granted to this State by act of Congress that the people of the State of California may avail themselves of the benefit of the eighth section of the act of Congress approved fourth of September, 1841, chapter sixteen, entitled "An act to appropriate the proceeds of the sale of the public lands and to grant pre-emption rights," the legislature of said State did provide for the selection and sale of said five hundred thousand acres of land, and authorized and directed the governor of the State to issue land warrants, and to deposit the same in the office of the treasurer of the State for sale, and authorized and directed the treasurer to sell such warrants.

And the parties purchasing such warrants were authorized to locate the same upon any vacant and unappropriated lands of the United States within the State of California.

That thereafter, to wit, in the year 1853, one Stephen Franklin purchased two of the land warrants so issued for 160 acres each, numbered respectively 612 and 614, and in the year 1853 did locate the same upon the land described in the complaint, to wit, lots one and two of section 26, in township 6 south, range
17 one west, Mount Diablo base and meridian, according to the United States Government surveys, situated in the county of Santa Clara, containing $106\frac{84}{100}$ acres, and upon other lands adjacent thereto, amounting in all to 320 acres.

That at the time of such location said lands were vacant and un-

appropriated, and were part of said 500,000 acres so granted to the State for the purposes of internal improvement.

That the 320 acres of land so located by said Franklin were surveyed by the county surveyor of the county of Santa Clara, who gave a certificate of such survey and location, in form required by law, to said Franklin, and which said certificate was entered and recorded as required by law.

That the defendant by mesne conveyances has succeeded to and acquired all the possession, right, title and interest in and to said land so acquired by said Franklin.

That at the time of such location of said land warrants, to wit, in the year 1853, said Stephen Franklin was in possession of the lands so located, which included the lands described in the complaint, all of which lands were at that time enclosed by a substantial enclosure, and then were and at all times thereafter down to the present time have been cultivated and otherwise improved by the defendant and those under whom he claims, and that the defendant succeeded to the possession of said Franklin and his grantees.

18 That by virtue of the act of Congress hereinbefore referred to, approved on the 23d day of July, 1866, the defendant acquired an equitable title to said land described in the complaint.

That the pretended right and title of the plaintiff to said land consist in and are founded upon a pretended purchase thereof and a patent therefor executed and delivered to him by the State of California long subsequent to the acquisition thereof by said Franklin by the purchase and location of said land warrants as aforesaid; and such pretended purchase was made by the plaintiff and said patent was obtained and received by him with notice and knowledge of this defendant's right, title, and interest in said land acquired by him as aforesaid.

Wherefore the defendant demands:

First. That said letters patent issued to the plaintiff by the State of California for the premises described in the complaint be adjudged and decreed to be null and void.

Second. That it be adjudged that the plaintiff holds the legal title to the premises described in the complaint in trust for the defendant, and that he be decreed to convey said premises to the defendant.

Third. That the title of the defendant to said premises be quieted as against the plaintiff; and that the defendant may have such other, further, or different relief in the premises as the nature

19 of the case may require and as may seem proper and agreeable to equity.

DOYLE, BARBER,
GALPIN & SCRIPTURE,
Attorneys for Defendant.

(Duly verified.)

Endorsed: Filed April 20, 1883. W. H. Owens, clerk, by H. S. Wilcox, deputy.

(Title of Court and Cause.)

Answer to Cross-Complaint.

And now comes the plaintiff herein and, answering the amended cross-complaint of the defendant herein, denies—

That the proper authorities or any of the authorities of the State of California ever selected any of the lands mentioned in the complaint herein under or in pursuance or in part satisfaction or by virtue of the act of Congress mentioned in said cross-complaint, as approved March 3, 1853, or of the grant made by such act of Congress; and said plaintiff further denies that at the date of any such pretended selection any part of the land described in said cross-complaint as the northwest quarter and the north half of the southwest quarter of section 16, in township 6 south, range
20 1 east, Mount Diablo base and meridian, was taken by any private claim or lost to said State of California, and denies that any part of about 20 acres thereof is yet so taken or lost to the State; and further denies that said 20 acres or any part thereof is or ever was included within the exterior limits of the Milpitas ranch; and this plaintiff alleges that after the part that was taken by the Milpitas ranch was so taken the State of California selected other lands than those mentioned in said complaint in lieu of the said lands so lost, and in due time such selection was duly approved by the United States and the lands thus selected were listed over by the United States to the State of California, and the State of California has since then sold and patented the same to purchasers in good faith; all of which happened before the year 1873.

This plaintiff denies that any of the land described in said complaint was ever listed or certified over by the United States or its Government or officers to the State of California in satisfaction or part satisfaction of the grant contained in said act of Congress approved March 3, 1853, or of any other grant ever made by Congress under which said defendant claims; but this plaintiff alleges that the same was listed and certified over and patented by the United States to the State of California in part satisfaction of the
21 grant made by the act of Congress entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and mechanics arts," approved July 2, 1862.

This plaintiff denies that in the year 1862 or at any other time James Donahue, or any one else, under or through whom said defendant claims, purchased from said State of California any of said lands described in said complaint, or that said State ever sold or disposed of to said James Donahue, or any other person under whom defendant claims, any of said lands.

This plaintiff denies that the act of Congress referred to in said cross-complaint as approved on July 23, 1866, confirmed to said State or authorized the listing over or certifying to her all or any lands that had theretofore been sold by the State of California to purchasers in good faith under her laws, except those lands which had thus been sold in cases wherein there should be an investiga-

tion and decision by the register and receiver of the United States for the proper district, and such decision should be to the effect that such lands had, prior to or on said July 23, 1866, been sold by the said State to a purchaser in good faith under her laws; and said plaintiff avers that no such investigation or decision was ever had with reference to any of said lands mentioned in said complaint or with reference to the disposal or sale or pretended disposal or
22 sale of said lands or any part thereof, nor did any purchaser or pretended purchaser, or any one else, ever demand or request of any one such investigation or decision, or make any proof that such lands or any part thereof had ever, prior to or on July 23, 1866, been disposed of or sold by said State in good faith, or under her laws, or at all. And, further answering said cross-complaint, this plaintiff on his information and belief denies that Stephen Franklin ever bought any land warrant or land warrants, or ever located any land warrant or land warrants on said land mentioned in said complaint or any part thereof, and denies that any of said lands are or ever were any part of the 500,000 acres granted to the State of California by the United States by the act of Congress referred to in said cross-complaint as approved on September 4, 1841, and denies that the county surveyor of Santa Clara county ever gave a certificate of any survey or location in form required by law of any location or survey of any of such lands in form required by law, or that any such certificate was ever entered or recorded as required by law.

This plaintiff denies that said defendant ever acquired any right, title, or interest in or to said lands or any part thereof, either
23 legal or equitable, and denies that said Franklin ever had or held any right, title, or interest in or to any part of said lands.

This plaintiff denies that purchasers of the land warrants mentioned in said cross-complaint were ever authorized to locate the same upon unsurveyed lands, and denies that any act of the legislature of California ever gave them the right so to do.

This plaintiff denies that James Donahue or said defendant, or any one under or through whom said defendant claims, was ever in possession of any said lands under or by virtue of any sale by the State of California, or the location of any warrant or warrants issued by said State, or by virtue of any right or title whatever to said lands or any part thereof, or that said lands or any part thereof were ever separately enclosed, or that any part thereof were ever improved after the first day of January, 1873.

This plaintiff admits that on June 1, 1882, the United States of America issued its letters patent conveying said lands last referred to to said State of California, but alleges that the same was not issued in satisfaction or part satisfaction of any grant ever made by the Congress of the United States, except the grant made by the said act of Congress approved July 2, 1862.

This plaintiff denies that said State of California ever took
24 or held any of the title to said land conveyed by said letters patent in trust for said defendant or any one else than this plaintiff.

This plaintiff denies that he does not have or claim title to said lands, except as alleged by the said cross-complaint.

This plaintiff denies that the application of Wm. W. Johnston mentioned in said cross-complaint was not accompanied by all the affidavits required by law to enable him to purchase the said lands as agricultural college lands; and this plaintiff alleges that said Johnston did, in the year 1873, purchase said lands as agricultural college lands under said grant of Congress made by said act approved July 2, 1862.

This plaintiff denies that the certificate of the land agent of the University of California mentioned in said cross-complaint was issued or made contrary to the duty of said land agent or without full legal authority.

This plaintiff alleges that the patent issued to him mentioned in said cross-complaint was duly signed and issued by the land agent of the said university.

This plaintiff denies that said James Donahue or said defendant, or any one under whom said defendant claims, ever had any title to any part of said lands mentioned in said complaint, either legal or equitable, and denies that this plaintiff ever had notice that
25 they or any of them were ever in possession of any part of said lands under or by virtue of any title whatever, either legal or equitable.

This plaintiff alleges that prior to January the 30th, 1865, the line of the Western division of the Central Pacific Railroad was definitely fixed, and on the date last aforesaid the odd-numbered sections of land were reserved by the United States and the proper officers thereof for a distance of ten miles on each side of said line for the benefit of the Central Pacific Railroad Company and its assigns; that the lands described in said complaint lie within the limits of said reservation and are and ever since January 30, 1865, have been double minimum lands.

That the order making such reservation and the act of Congress, entitled "An act to extend pre-emption rights to certain lands therein mentioned," approved March 3, 1853, and the act of Congress, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1, 1862, and the act of Congress amending such last-named act, approved July 2, 1864, reserved all even-numbered sections embraced in said limits, and said
26 lands described in said complaint were thus embraced and were reserved from private entry or location, and at no time after January 30, 1865, was any part of said lands described in said complaint subject to location except by an act of Congress approved June 8, 1868, entitled "An act to further provide for giving effect to various grants of public lands to the State of Nevada," and the act of Congress approved March 3, 1871, amendatory of said last-named act, said even-numbered sections, and said land described in said complaint, to wit, lots 1 and 2 in section 26, in township 6 south, range 1 west, Mount Diablo meridian, in Santa Clara county,

State of California, was rendered subject to location under the grant from the United States to the State of California under the said act of Congress approved July 2, 1862.

That the United States survey was not made nor the township plat filed of said township number 6 south, range 1 west, Mount Diablo base and meridian, until the month of May, A. D. 1866.

And this plaintiff, further answering, denies that the said defendant is entitled to the relief, or any part thereof, in the said cross-complaint demanded.

S. F. LEIB,
Attorney for Plaintiff.

T. H. LAINE, *Of Counsel.*

(Duly verified.)

Endorsed: Filed April 25, 1883. W. H. Owens, clerk, by H. E. Wilcox, deputy.

27 (Title of Court and Cause.)

Findings and Decision.

The issues joined in this action on the plaintiff's complaint and the defendant's answer thereto and on the defendant's cross-complaint and the plaintiff's answer thereto were brought on for trial before the court (a trial by jury having been waived) on the fourth day of June, one thousand eight hundred and eighty-three, and the court, having heard and considered the evidence adduced by the respective parties, does find and decide as follows:

That in the month of July, 1853, James T. Ewing purchased of the treasurer of the State of California two land warrants for one hundred and sixty acres each, numbered respectively 612 and 614, issued by the governor of said State under and in pursuance of the act of the legislature of said State entitled "An act to provide for the disposal of the five hundred thousand acres of land granted to the State by act of Congress that the people of the State of California may avail themselves of the benefits of the eighth section of the act of Congress approved September 4th, eighteen hundred and forty-one, chapter sixteen, entitled 'An act to appropriate the proceeds of the sales of the public lands and to grant pre-emp-

28 tion rights,' the following provisions are hereby enacted:"

And thereafter, to wit, on the 6th day of August, 1853, said Ewing, for good and sufficient consideration, sold, assigned, and transferred said land warrants to one S. C. Hastings, and said Hastings thereafter, to wit, on the first day of September, 1853, for good and sufficient consideration, sold, assigned, and transferred said land warrants to Stephen Franklin.

That thereafter, to wit, in the month of September, 1853, said Stephen Franklin did locate said warrants upon three hundred and twenty acres of land in one body, which land covered and included the one hundred and six and $\frac{84}{100}$ acres of land described in the plaintiff's complaint, except a small strip on the westerly side

thereof; that the land so located was run off by a line north and south and east and west and sufficiently designated by lines, distances, and corners in the field, and an entry thereof was made in the office of the clerk of the county court of said county of Santa Clara and which said lands so located were surveyed by the county surveyor of said county of Santa Clara in the month of September, 1853, who gave a certificate setting forth the bounds thereof and number of acres, and the clerk of said county court did
29 thereupon make and file in his office a record of such certificate, and the same was recorded in his office on the 24th day of September, 1853, in Book of Records of School Land Warrants, at pages 32 and 33; that said school land warrants, as located in the field, were located and established about eighty feet east of the eastern line of said subdivision as finally established by the official survey.

And the county surveyor of said county of Santa Clara did, in due time thereafter, make out and forward to the office of the surveyor general of the State of California a duplicate of such survey and certificate of location of said warrants.

That at the time of such location of said warrants the lands so located and covered thereby were vacant and unappropriated public lands of the United States, and were so located and purchased as part of the 500,000 acres granted to this State for purposes of internal improvement by act of Congress approved September 4, 1841.

That in the year 1862 said James Donahue, now deceased, the father of the defendant, purchased and acquired from and through said Stephen Franklin and his grantees all of the right, title, and interest in and to the same so acquired by said Stephen Franklin by his purchase and location of said land warrants, and there-
30 upon entered into and took actual and open possession thereof.

That at the time said land was so taken possession of about ten acres of the same was within the exterior boundaries of the Mexican grant thereafter duly patented to the Mexican granter and known as the "Ulistac rancho."

That in the year 1864 or 1865 the said James Donahue departed this life, and the defendant, who is his son, has and before the commencement of this action had, by devise, descent, and mesne conveyances, succeeded to and acquired all the right, title, and interest in and to said $106\frac{85}{100}$ acres of land mentioned in the complaint that had been theretofore, at any time or in any way, acquired by or vested in said James Donahue.

That at the time of the location of said land warrants said Franklin was in the actual possession of said $106\frac{84}{100}$ acres, and the same, with other lands adjacent thereto, making altogether five hundred and seventy-eight acres, were openly possessed, cultivated, and improved by him as a single farm, and there was then and ever since has been thereon a dwelling-house, barns, orchard, vineyard, and other improvements; that upon the 106 acres now in question the only improvements were an artesian well, with ditches for
31 carrying the water from the same, and an avenue of shade

trees, which ran diagonally across said 106 acres. The whole of said tract was under one general inclosure, and the improvements were upon the general tract. And ever since the location of said warrants down to the present time said farm, including said $106\frac{84}{100}$ acres has been substantially enclosed and openly, notoriously, and continuously cultivated and improved by the defendant and those through and under whom he claims as aforesaid. The said $106\frac{84}{100}$ acres were not and are not separately enclosed, but were and are within the exterior boundaries and enclosure of said farm.

That in the year 1862 the State of California, in order to avail itself of the grant to said State for the purpose of public schools, of sections 16 and 36 in each township, and of lands in lieu thereof, made by act of Congress approved March 3d, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," and in part satisfaction of said grant, did select the 106.84 acres of land described in the plaintiff's complaint, and other lands adjoining the same, making in all 225.80 acres, in lieu of the following lands in said county of Santa Clara, viz: The northwest quarter and the north half of the southwest quarter of section sixteen, in township number six south, range one east, Mount Diablo base
32 and meridian, according to the United States Government surveys, containing two hundred and forty acres.

That the last-mentioned land-, in lieu whereof the lands described in the complaint were so selected, were at the time of such selection and still are included within the exterior limits of a Mexican grant not confirmed by the United States until 1869, known as the Milpitas rancho, except about 20 acres thereof, which said 20 acres excluded from the above-mentioned grant are now claimed to be within the Mexican grant to the pueblo of San José, the title to which last-named grant has been finally confirmed to the mayor and common council of San José, but no final survey thereof has yet been approved, but is now pending before the said Commissioner of the General Land Office of the United States. The patent of the United States issued for said Milpitas rancho on June 30, 1871.

That thereupon, in the year 1862, after said lands had been so selected by the State of California, the said State did, under her laws and in conformity therewith, for a good and sufficient consideration, sell and dispose of the same to said James Donahue, who was then and there a citizen of this State.

33 That said James Donahue purchased the same of the State in good faith and paid to the State therefor the full purchase price thereof, with interest, as follows, viz: He so paid the sum of $84, being 20 per cent. of the purchase price and one year's interest, on the 22d of November, 1862, and he paid the balance of the purchase price and interest thereon, amounting to $288, on the 20th of January, 1864, and the said State did thereupon issue and deliver to said James Donahue a certificate of purchase for said land, bearing date January 14, 1863, which certificate of purchase was recorded in the office of the county recorder of said Santa Clara county on the 3d day of April, 1874.

That thereafter, in May, A. D. 1866, said township No. 6 south, wherein the land in question was situated, was first surveyed under and by virtue of the laws of and by authority of the United States, and the plat of such survey was returned and filed in the United States land office of the district embracing said township on the 19th day of May, 1866.

That after such survey, to wit, on the 30th day of May, 1866, the State of California did again, and in part satisfaction of said grant by Congress of the 16th and 36th sections and lands in lieu thereof, select and relocate the same 106.84 acres of land, with said other land adjoining, making in all 225.80 acres, in lieu of
34 said northwest quarter and north half of the southwest quarter of section 16, township 6 south, range 1 east, Mount Diablo base and meridian, containing 240 acres.

And on said 30th day of May, 1866, the proper authorities of said State did notify, in writing, the register of the United States land office for the district within which said land was situated of such selection and relocation, and did deliver to said register his written application for such relocation, which was received by said register and forwarded by him to the General Land Office of the United States the same day.

That afterwards, to wit, on the 9th day of April, 1867, the proper authorities of the State of California did notify, in writing, the register of the United States land office of the district within which said land was located of the said selection of said land last above mentioned, and that said land had, prior to the passage of the act of Congress entitled "An act to quiet land titles in California," approved July 23d, 1866, been so selected and disposed of by the State to a purchaser in good faith under her laws, which notice was received by the register of the said United States land office and filed by him on the 10th day of April, 1867.

At the time of the passage of said act of Congress, ap-
35 proved July 23, 1866, no pre-emption claim, homestead or other right, to the lands in question adverse to the defendant or those under whom he claims had been acquired by any settler under the laws of the United States, nor had said lands been reserved for naval, military, or Indian purposes by the United States, nor was the same mineral land, nor was it held or claimed under any Mexican or Spanish grant, nor was it included within the limits of any city, town, or village.

That in the year 1864 or 1865 the said James Donahue departed this life, and the defendant, who is his son, has and before the commencement of this action had, by devise, descent, and mesne conveyances, succeeded to and acquired all the right, title, and interest in and to said $106\frac{85}{100}$ acres of land mentioned in the complaint, that had been acquired by or vested in said James Donahue by his purchase thereof from the State as lieu land.

At the time of the application to purchase said land from the State by said James Donahue, to wit, in the year 1862, said James Donahue was in the actual possession and occupation thereof, and the same, with other lands adjacent, was substantially enclosed, culti-

vated, and improved by him, and ever since that time the said James Donahue, up to the time of his death, and the defendant, subsequent to that time, have been, and the defendant still is, in the actual possession of the same, and the same has been, during all such time, substantially enclosed with other lands, all within one general enclosure, and cultivated by them.

36

That on the 10th day of September, 1873, one William W. Johnston made application to the regents of the University of California to purshase said 106.85 acres of land under the act of Congress of July 2d, 1862, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," and in pursuance of the act of the legislature of the State of California, approved March 23d, 1863, entitled "An act to create and organize the University of California," which application was accepted by the land agent of said university on the 10th day of September, 1873.

Whereupon said land agent of said university proceeded, on the 11th day of September, 1873, to select and locate and did select and locate said land in the office of the register of the United States land office for the district wherein said land was situated, in pursuance of said application of said Johnston, and gave a certificate thereof.

That at the time of the acceptance of the application of said Johnston he paid said land agent of the university on account of the purchase price of said land the sum of $111.84, that being all he was required to pay, and thereupon received from said agent a certificate of location and purchase bearing date November 3d, 1874.

37

That in the month of November, 1874, said 106.85 acres of land in said section 26 were certified over to the State of California by the Commissioner of the General Land Office of the United States and the Secretary of the Interior by writings in the words and figures following, viz:

"List No. 3 of lands selected in the San Francisco district, California, by a duly authorized agent of said State, under the provisions of the act of Congress approved July 2d, 1862, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," and the act amendatory thereto, approved March 3, 1871, entitled "An act to further provide for giving effect to the various grants of public lands to the State of Nevada:"

82.50 Land.

Date of selection.	No. of application.	Description of tracts.	Sec.	T'p.	Range.	Area of tracts.	Area accepted by State.
Oct. 30, 1871	116	N. ½ of S. E. ¼ and N. ½ of N. W. ¼.	8	3 S.	4 E.	160.00	160.00
Jan. 13, 1873	172	Lot 1, S. E. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼.	2	4 S.	1 W.	119.89	119.89
Sept. 11, 1873	14	Lots 1 and 2	26	6 S.	1 W.	106.84	106.84
Mar. 28, 1874	56	Lot 1	10	7 S.	1 W.	18.39	40.00
" " "	56	Lot 7	10	7 S.	1 W.	7.59	40.00
		Total				412.71	466.73

38 "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *Nov. 2d*, 1874.

"It is hereby certified that the tracts described in the foregoing list are embraced in the original lists, now on file in this office, of lands selected by the State of California in pursuance of the above-cited acts of Congress of July 2, 1862, and March 3, 1871.

"It is further certified that the said tracts have been examined and compared with the township plats and tract books of this office and are found to be subject to selection and free from conflicts, and it is therefore recommended that the lists be approved, subject to any valid interfering rights which may have existed at the date of selection.

"S. S. BURDETT,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR, *3d November*, 1874.

"The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

"C. DELANO, *Secretary.*"

And thereafter, to wit, on the 24th day of April, 1879, said William W. Johnston assigned and transferred all of his right and interest in such application and in such certificate of purchase and in said 106.80 acres of land to the plaintiff.

Thereafter, on the 17th day of June, 1882, the plaintiff paid to said regents the residue of the purchase price agreed by said Johnston to be paid for said land, which had not already been paid.

39 Thereafter, on the first day of June, 1882, the United States of America, by letters patent bearing date that day, granted and conveyed said 106.80 acres of land to the State of California, subject to the disposal of the legislature of said State, which letters patent were recorded in the office of the recorder of said county of Santa Clara, on the 8th day of July, 1882, in Liber C of Patents, on page 288 and following.

And thereafter, to wit, on the 17th day of June, 1882, the State

of California, by its letters patent dated that day, granted and conveyed said 106.85 acres of land to the defendant, which letters patent were recorded in the office of the recorder of said county of Santa Clara, on the 21st day of July, 1882, in Liber C of Patents, at page 292.

That at the time of said application by William W. Johnston to purchase said land, and at the time he made such payment on account of the purchase price therefor, he had notice of the defendant's rights and interests therein, and at the time of the assignment to the plaintiff by said Johnston of such certificate of purchase, and at the time the plaintiff paid the balance of the purchase price agreed to be paid by said Johnston for said land, and at the time he received such patent therefor, he had notice of the defendant's rights and interests in said land by reason of the notorious and conspicuous occupation of the same by the defend-
40 ant and by reason of the permanent, conspicuous, and extensive improvements then upon said lands, and in no other way.

On the 30th day of January, 1865, a map of the general route of the Western division of the road of the Western Pacific Railroad Company between San José and Sacramento, forwarded by the Department of the Interior, together with a letter from such department, was received and filed in the office of the register and receiver of the United States land office for the district within which the land in question was situated, which letter was in words and figures following, viz:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *Dec.* 23, 1864.

"Register and receiver, San Francisco, Cal.

"GENTS: I enclose herewith a map of the general route of the Western division of the Central Pacific railroad within your district. The line of railroad from Sacramento to San Francisco by way of Stockton and San José and the limits of the same are indicated on the map by red color. The limits of your district south and east are indicated by green shade.

"Upon the receipt of this letter you will withdraw from sale, location, pre-emption, and homestead the vacant odd-numbered sections and parts of sections within 25 miles on each side of said road, as indicated by the diagram herewith. The even-numbered sections within said limits will be subject to homestead and pre-emption, but not subject to private entry or location.

"When said route passes through the surveyed lands the register will proceed at once to lay down in lead pencil on the
41 township plats, so far as returned to his office, the 25-mile limits of the reserve on each side of said route, and make the proper notes thereon, showing that the lands embraced within said limits are reserved as aforesaid, and as surveys come in he will proceed in like manner to lay down the limits of the reservation and make similar notes thereon, and immediately report the same

to this office, so that this order may be strictly observed in withholding the lands as herein directed.

"This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you.

"Very respectfully, your ob't ser't,

"J. M. EDMUNDS,
"*Commissioner.*"

The Western Pacific Railroad Company mentioned in the complaint succeeded to the right to construct such railroad between San José and Sacramento, and to the land grant accompanying the same, by assignment from said Central Pacific Railroad Company, dated October 31, 1864, and approved by Congress March 3, 1865. The lands in dispute are within 10 miles of and upon the side of the general line of said Western Pacific railroad as laid down upon said map, and said railroad was thereafter constructed on said line.

On the 28th day of November, 1867, the Commissioner of the General Land Office of the United States forwarded to the register of the United States land office for the district within which
42 the land in question was situated a map showing the sectionized twenty-mile limits for the first twenty miles of said railroad running easterly from San José, within the exterior boundaries *of* whereof was situated the land in question, which map was received and filed in the office of said register on the 2d day of January, 1867. Said map was accompanied by a letter from the Commissioner of the General Land Office in the words and figures following, viz:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *Nov.* 28, 1866.

"Register land office, San Francisco, Cal.

SIR: In compliance with your request, contained in letter of the 17th ultimo, transmitting map with list No. 1 of selections for the Western Pacific Railroad of California, I herewith enclose a diagram showing the sectionized twenty-mile limits for the first section of twenty miles running eastward from San José.

"You will, therefore, please to acknowledge the receipt, and give the precise date of its reception.

"Very respectfully, your obd't serv't,

"JOS. S. WILSON,
"*Commissioner.*"

On November 2d, 1868, lots 1, 2, 3, and 4 and the northwest ¼ of southeast ¼ and southeast ¼ of northeast ¼ and northeast ¼ of southeast ¼ of section 21, in township nine south, of range four west, Mount Diablo meridian, containing 213.98 acres of land in California, was selected by the State of California, in the United States land office for the San Francisco land district wherein said lands lie, as
43 indemnity for the northwest ¼ and northwest ¼ of southwest ¼ of section sixteen, township six south, range one east, Mount

Diablo meridian, and such selection was approved by the United States and certified over by the United States to the State of California in clear list No. 10, San Francisco series, on the 30th day of August, A. D. 1869.

The said State sold said land and conveyed the same to a purchaser thereof by patent issued on January 7th, 1873.

And as conclusions of law the court finds that defendant is entitled to and do have judgment as follows:

1st. That the plaintiff take nothing by this action.

2d. That at the time of the commencement of this action the defendant was and still is entitled to the possession of the premises described in the plaintiff's complaint.

3d. That at the time of the commencement of this action the defendant was and still is the equitable owner of and entitled to the premises described in the plaintiff's complaint, and that the plaintiff holds the legal title thereto in trust for the defendant under and by virtue of said letters patent issued and delivered to him by the State of California, bearing date the eighteenth day of June, 1882.

44 4th. That the plaintiff execute and deliver to the defendants forthwith a deed of conveyance of said premises, whereby he shall grant and convey the same to him, such deed to be in form and substance like Schedule A hereto annexed.

Let judgment be entered accordingly, and for costs, in favor of the defendant, to be taxed.

D. BELDEN,
Superior Judge.

Dated June 16, 1884.

SCHEDULE A.

This indenture, made the — day of ——, one thousand eight hundred and eighty-four, between John H. McNee, of the city and county of San Francisco, State of California, of the first part, and Peter J. Donahue, of the same place, of the second part, witnesseth as follows:

Whereas, in a certain action in the superior court of the county of Santa Clara, State of California, wherein said John H. McNee was plaintiff and said Peter J. Donahue was defendant, such proceedings were had that on the — day of ——, 1883, judgment was rendered directing and decreeing that the plaintiff execute and deliver to the defendant a deed whereby he should grant and convey to him the lands and premises described in the plaintiff's

45 complaint in said action and hereinafter described:

Now, therefore, by virtue of the premises and in pursuance of said judgment the party of the first part does hereby grant and convey to the party of the second part all that tract or parcel of land situated in the county of Santa Clara, State of California, known and described as follows, viz: Lots one and two of section number twenty-six, township number six south, range number one west, of Mount Diablo base and meridian, according to the United States

to this office, so that this order may be strictly observed in withholding the lands as herein directed.

"This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you.

"Very respectfully, your ob't ser't,

"J. M. EDMUNDS,
"*Commissioner.*"

The Western Pacific Railroad Company mentioned in the complaint succeeded to the right to construct such railroad between San José and Sacramento, and to the land grant accompanying the same, by assignment from said Central Pacific Railroad Company, dated October 31, 1864, and approved by Congress March 3, 1865. The lands in dispute are within 10 miles of and upon the side of the general line of said Western Pacific railroad as laid down upon said map, and said railroad was thereafter constructed on said line.

On the 28th day of November, 1867, the Commissioner of the General Land Office of the United States forwarded to the register of the United States land office for the district within which
42 the land in question was situated a map showing the sectionized twenty-mile limits for the first twenty miles of said railroad running easterly from San José, within the exterior boundaries *of* whereof was situated the land in question, which map was received and filed in the office of said register on the 2d day of January, 1867. Said map was accompanied by a letter from the Commissioner of the General Land Office in the words and figures following, viz:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *Nov.* 28, 1866.

"Register land office, San Francisco, Cal.

SIR: In compliance with your request, contained in letter of the 17th ultimo, transmitting map with list No. 1 of selections for the Western Pacific Railroad of California, I herewith enclose a diagram showing the sectionized twenty-mile limits for the first section of twenty miles running eastward from San José.

"You will, therefore, please to acknowledge the receipt, and give the precise date of its reception.

"Very respectfully, your obd't serv't,

"JOS. S. WILSON,
"*Commissioner.*"

On November 2d, 1868, lots 1, 2, 3, and 4 and the northwest ¼ of southeast ¼ and southeast ¼ of northeast ¼ and northeast ¼ of southeast ¼ of section 21, in township nine south, of range four west, Mount Diablo meridian, containing 213.98 acres of land in California, was selected by the State of California, in the United States land office for the San Francisco land district wherein said lands lie, as
43 indemnity for the northwest ¼ and northwest ¼ of southwest ¼ of section sixteen, township six south, range one east, Mount

Diablo meridian, and such selection was approved by the United States and certified over by the United States to the State of California in clear list No. 10, San Francisco series, on the 30th day of August, A. D. 1869.

The said State sold said land and conveyed the same to a purchaser thereof by patent issued on January 7th, 1873.

And as conclusions of law the court finds that defendant is entitled to and do have judgment as follows:

1st. That the plaintiff take nothing by this action.

2d. That at the time of the commencement of this action the defendant was and still is entitled to the possession of the premises described in the plaintiff's complaint.

3d. That at the time of the commencement of this action the defendant was and still is the equitable owner of and entitled to the premises described in the plaintiff's complaint, and that the plaintiff holds the legal title thereto in trust for the defendant under and by virtue of said letters patent issued and delivered to him by the State of California, bearing date the eighteenth day of June, 1882.

44 4th. That the plaintiff execute and deliver to the defendants forthwith a deed of conveyance of said premises, whereby he shall grant and convey the same to him, such deed to be in form and substance like Schedule A hereto annexed.

Let judgment be entered accordingly, and for costs, in favor of the defendant, to be taxed.

D. BELDEN,
Superior Judge.

Dated June 16, 1884.

SCHEDULE A.

This indenture, made the — day of ——, one thousand eight hundred and eighty-four, between John H. McNee, of the city and county of San Francisco, State of California, of the first part, and Peter J. Donahue, of the same place, of the second part, witnesseth as follows:

Whereas, in a certain action in the superior court of the county of Santa Clara, State of California, wherein said John H. McNee was plaintiff and said Peter J. Donahue was defendant, such proceedings were had that on the — day of ——, 1883, judgment was rendered directing and decreeing that the plaintiff execute and deliver to the defendant a deed whereby he should grant and convey to him the lands and premises described in the plaintiff's

45 complaint in said action and hereinafter described:

Now, therefore, by virtue of the premises and in pursuance of said judgment the party of the first part does hereby grant and convey to the party of the second part all that tract or parcel of land situated in the county of Santa Clara, State of California, known and described as follows, viz: Lots one and two of section number twenty-six, township number six south, range number one west, of Mount Diablo base and meridian, according to the United States

Government surveys, containing one hundred and six acres and $\frac{84}{100}$ of an acre—

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging:

To have and to hold the same unto the party of the second part, his heirs and assigns forever.

—— ——. [L. S.]

Endorsed: Filed June 16, 1884. W. H. Owens, clerk, by M. H. Hyland, deputy.

(Title of Court *of* Cause.)

Judgment.

The issues joined in this action on the plaintiff's complaint and the defendant's answer thereto and on the defendant's cross-
46 complaint and the plaintiff's answer thereto were brought on for trial before the court on the fourth day of June, one thousand eight hundred and eighty-three (a trial by jury having been waived), and, the evidence of the respective parties and the arguments of their respective counsel having been heard and considered, the court afterwards, to wit, on the 16th day of June, 1884, made and filed its findings and decision in writing.

Now, therefore, it is considered and adjudged that the plaintiff take nothing by this action, and it is ordered and decreed that the plaintiff do, within ten days from service of notice of the order, execute and deliver to the defendant a deed of conveyance whereby he shall grant and convey to the defendant the premises described in the complaint, viz., all that tract or parcel of land situated in the county of Santa Clara, State of California, known and described as follows, to wit: Lots number one and number two of section number twenty-six, in township number six south, range number one west, of Mount Diablo base and meridian, according to the United States Government surveys, containing one hundred and six acres and $\frac{84}{100}$ acres, more or less.

The said deed to be in form and substance as follows, viz:

"This indenture, made the — day of July, one thousand
47 eight hundred and eighty-four, between John H. McNee, of the city and county of San Francisco, State of California, of the first part, and Peter J. Donahue, of the same place, of the second part, witnesseth as follows:

"Whereas, in a certain action in the superior court of the county of Santa Clara, State of California, wherein said John H. McNee was plaintiff and said Peter J. Donahue was defendant, such proceedings were had that on the 8th day of July, 1884, judgment was rendered therein directing and decreeing that the said plaintiff execute and deliver to the said defendant a deed whereby he should grant and convey to him the lands and premises described in the plaintiff's complaint in said action and hereinafter described:

"Now, therefore, by virtue of the premises and in pursuance of said judgment the party of the first part does hereby grant and con-

vey to the party of the second part all that tract or parcel of land situated in the county of Santa Clara, State of California, known and described as follows, viz:

"Lots one and two of section number twenty-six, township number six south, range number one west, of Mount Diablo base and meridian, according to the United States Government surveys, containing one hundred and six acres and $\frac{84}{100}$ of an acre, more or less, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging; to have and to hold the same unto the party of the second part, his heirs and assigns forever."

48

——— ———. [L. S.]

And if said John H. McNee shall for the period of ten days from and after service of this notice fail and refuse to make, execute, and deliver such deed, then in such case Wm. H. Owens, Esq., clerk of this court, is appointed commissioner for and in the name of said McNee to make, execute, and deliver such deed.

It is further adjudged that the defendant recover of the plaintiff the sum of fifty dollars, his costs of this action.

D. BELDEN,
Superior Judge.

Dated July 8, 1884.

Endorsed: Filed July 8, 1884. W. H. Owens, clerk, by H. E. Wilcox, deputy.

(Title of Court and Cause.)

Notice of New Trial.

To Peter Donahue, the defendant herein, and Messrs. Doyle, Barber, Galpin and Scripture, his attorneys:

Please take notice that the court above named has filed its findings and decision herein in favor of the defendant and against the plaintiff, and you will therefore take notice that the said John H. McNee intends to and will move and apply to said court for a new trial herein, and to vacate and set aside the findings and decision herein, and grant him a new trial herein for the following causes and upon the following grounds, materially affecting his substantial rights, viz:

49

1st. The evidence was and is insufficient to justify the findings or decision herein.

2d. The decision herein is against law.

3d. Errors in law occurring at the trial and excepted to by said plaintiff.

Said application and motion will be made upon a statement of the case, to be hereafter prepared, served, settled, and filed.

S. F. LEIB,
Attorney for Plaintiff.

T. H. LAINE, *Of Counsel.*

Endorsed: Received a copy of the within notice this June 26, 1884. Doyle, Barber, Galpin & Scripture, attorneys for defendant. Filed June 25, 1884. W. H. Owens, clerk, by M. H. Hyland, deputy.

50 (Title of Court and Cause.)

Statement on Motion for a New Trial.

This case was tried without a jury, the parties consenting thereto. On the trial the following evidence was given and the following proceedings were had:

The plaintiff introduced in evidence clear list No. 3, from the United States to the State of California, which, with its endorsements thereon, is in words and figures following, viz:

"List No. 3 of lands selected in the San Francisco district, California, by a duly authorized agent of said State, under the provisions of the act of Congress approved July 2d, 1862, entitled 'An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts,' and the act amendatory thereto, approved March 3, 1871, entitled 'An act to further provide for giving effect to the various grants of public lands to the State of Nevada.'"

$2.50 *Land.*

Date of selection.	No. of application.	Description of tracts.	Sec.	T'p.	Range.	Area of tracts.	Area accepted by State.
Oct. 30, 1871	116	N. ½ of S. E. ¼ and N. ½ of N. W. ¼.	8	3 S.	4 E.	160.00	160.00
Jan. 13, 1873	172	Lot 1, S. E. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼.	2	4 S.	1 W.	119.89	119.89
Sept. 11, 1873	14	Lots 1 and 2	26	6 S.	1 W.	106.84	106.84
Mar. 28, 1874	56	Lot 1	10	7 S.	1 W.	18.39	40.00
" " "	56	Lot 7	10	7 S.	1 W.	7.59	40.00
		Total	-----	-----	-----	412.71	466.73

51 "DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *Nov. 2d*, 1874.

"It is hereby certified that the tracts described in the foregoing list are embraced in the original lists now on file in this office of lands selected by the State of California in pursuance of the above-cited acts of Congress of July 2, 1862, and March 3, 1871.

"It is further certified that the said tracts have been examined and compared with the township plats and tract books of this office and are found to be subject to selection and free from conflicts, and it is therefore recommended that the list be approved, subject to any

valid interfering rights which may have existed at the date of selection.

"S. S. BURDETT,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR, 3*d November*, 1874.

"The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

"C. DELANO, *Secretary.*"

And said list was endorsed by the examiner as follows, viz:

"GENERAL LAND OFFICE, *November* 2, 1874.

"The tracts described in the following lists have been critically examined and are found to be free from conflicts and to inure to the State for the purposes indicated.

"J. J. BARNES."

52 The plaintiff then introduced in evidence a patent of the United States to the State of California, which is in words and figures following, viz.:

The United States of America
to
The State of California.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the act of Congress approved July 2, 1862, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," and of the act of Congress approved June 8, 1868, entitled "An act to further provide for giving effect to the various grants of public lands to the State of Nevada," and of the act of Congress approved March 31, 1871, amendatory of the act last above named, wherein it is provided that section four of an act entitled "An act to further provide for giving effect to the various grants of public lands to the State of Nevada" be, and the same is hereby, amended so as to read as follows: "And it is further enacted that the lands granted to the State of California for the establishment of an agricultural college by the act of July second, eighteen hundred and sixty-two, and acts amendatory thereto, may be selected by said State from any lands within said State
53 subject to pre-emption settlement, entry, sale, or location under any laws of the United States. Such selection may be made in any legal subdivisions adjoining by sides so as to constitute bodies of not less than one hundred and sixty acres, or they may be made in separate subdivisions of forty, eighty, or one hundred and twenty acres respectively: Provided, that this privilege shall not extend to lands upon which there may be rightful claims under the pre-emption and homestead laws nor to mineral lands; and further provided,

that if lands be selected as aforesaid, the minimum price of which is two dollars and fifty cents per acre, they shall be taken, acre for acre, in part satisfaction of the grant, and the State of California shall pay to the United States the sum of one dollar and twenty-five cents per acre for each acre so selected when the same shall be patented to the State by the United States. And whereas, in pursuance of instructions from the General Land Office, the several tracts or parcels of land hereinafter described, situate in the districts of lands subject to sale at San Francisco, in the State of California, having been selected by the said State of California under the provisions of the act of Congress above named; and whereas there have been deposited in the General Land Office certain receiver's receipts, numbered respectively 7898, 7899, 7900, 7968, and 8085, issued
54 by the receiver of the United States land office at San Francisco, in the said State of California, whereby it is shown that the excess of one dollar and twenty-five cents per acre has been paid to the United States, as provided in the said act of March 3, 1871, by the said State of California, upon the said land selected as aforesaid, to wit, the southwest quarter of the southwest quarter of section twenty-eight, in township two north, of range three east, of Mount Diablo meridian, containing forty acres;

The lot numbered four, of section thirty-four, in township thirty south, of range twelve east, of Mount Diablo meridian, containing seventeen acres and fifty-one hundredths of an acre;

The southeast quarter of the southwest quarter of section thirty, in township seven south, of range three west, of Mount Diablo meridian, containing forty acres;

The lots numbered seven and eight, of section six, in township four south, of range five east, of Mount Diablo meridian, containing one hundred and sixty acres;

And the lots numbered one and two, of section twenty-six, in township six south, of range one west, of Mount Diablo meridian, containing one hundred and six acres and eighty-four hundredths of an acre, and comprising in the aggregate three hundred and sixty-four acres and thirty-five hundredths of an acre, ac-
55 cording to the official plats of the survey of the said lands returned to the General Land Office by the surveyor general:

Now, therefore, know ye that the United States of America, in consideration of the premises and in conformity with the acts of Congress aforesaid, have given and granted, and by these presents do give and grant, unto the State of California, in fee simple, subject to the disposal of the legislature thereof, the tracts of land above described:

To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances thereunto belonging, unto the said State of California in fee simple and to its assigns forever.

In testimony whereof I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of June, in the year of our Lord one thousand eight hundred and

eighty-two, and of the Independence of the United States the one hundred*th* and sixth.

[SEAL.] By the President:

CHESTER A. ARTHUR,
By WM. H. CROOK, *Secretary.*

S. W. CLARK,
Recorder of the General Land Office.

Recorded, miscellaneous, vol. 1, pages 147 to 150, inclusive.

56 Endorsed: Recorded at the request of Wells, Fargo & Co., July 8, 1882, at 44 minutes past 9 o'clock, a. m. H. W. Stephens, county recorder.

Plaintiff then introduced in evidence patent from the State of California to plaintiff, which is in words and figures following, viz:

UNITED STATES OF AMERICA, }
State of California. }

To all to whom these presents shall come, Greeting:

Whereas under the provisions of an act of Congress of the United States entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, one hundred and fifty thousand acres of the public lands were granted to the State of California; and whereas the legislature of the State of California has provided for the sale and conveyance of said lands by statutes enacted from time to time; and whereas it appears by the certificate of the land agent of the university, No. 277, issued in accordance with the provisions of law, bearing date the sixteenth day of June, A. D. 1882, that the tracts of agricultural college land hereinafter described have been duly and properly located in accordance with law, and that John H. McNee, assignee of Wm. Johnston, is entitled to receive a patent therefor:

57 Now, therefore, the State of California hereby grants to the said John H. McNee and to his heirs and assigns forever said tracts of land located as aforesaid, and which are known and described as follows, to wit:

Lots one (1) and two (2) of section twenty-six (26) south, range one (1) west, Mount Diablo meridian, containing one hundred and six and $\frac{84}{100}$ acres, taken in lieu of one hundred and six and $\frac{84}{100}$ acres, together with all the privileges and appurtenances thereunto appertaining and belonging; to have and to hold the aforegranted premises to the said John H. McNee and to his heirs and assigns, to his and their use and behoof forever.

In testimony whereof I, Geo. C. Perkins, governor of the State of California, have caused these letters to be made patent and the seal of the State of California to be hereunto affixed.

Given under my hand, at the city of Sacramento, this the seven-

teenth day of June, in the year of our Lord one thousand eight hundred and eighty-two.

[Great Seal of State.]

GEORGE C. PERKINS,
Governor of the State.

Attest:

D. M. BURNS,
Secretary of State.

[Seal of University.]

Countersigned.

J. HAM. HARRIS,
Land Agent of the University.

58 Recorded, at request of S. F. Leib, in Book C of Patents, page 292 *et seq.*, July 21, 1882, at 45 minutes past 9 o'clock a. m., records of Santa Clara county, California.

H. W. STEPHENS,
County Recorder,
By F. J. SAXE, *Deputy.*

The defendant then admitted that he was and at the commencement of this suit had been in possession of the land sued for in the complaint.

Plaintiff then rested.

The defendant then read in evidence the deposition of STEPHEN FRANKLIN, who testified as follows: "I reside in the city and county of San Francisco. I am the same S. Franklin whose name appears in the assignment endorsed upon the two school land warrants now shown to me, numbered 612 and 614, for 160 acres each, issued by the State of California to James T. Ewing. I caused these warrants to be located in 1853 by William J. Lewis, then county surveyor of Santa Clara county. The lands covered by these warrants were within the exterior boundaries of a tract of near six hundred acres, then in my possession, known as the Laurel Wood farm. I resided on this farm at the time of the location of the warrants. I had a dwelling-house and barn and outbuildings on the farm. I
59 cultivated the farm in wheat every year while I lived there. I had a vineyard and orchard near my house. There was an avenue leading from my house to the Alviso road. The avenue was fenced, and there was a row of trees on each side of it. The avenue passed across a corner of the 106.84 acres in question in this action. There was a fence around the farm, a substantial fence. There were some cross-fences. This particular 106.84 acres was covered by land warrant No. 612, as near as I can remember. It was not separately fenced in; it was a part of a larger field. I continued to reside on the farm and to cultivate and improve it down to September, 1865, when I sold it."

Defendant then introduced in evidence two land warrants in usual form, and numbered 612 and 614, for 160 acres each, issued to James T. Ewing by the State of California in July, 1853, under the act of

the legislature of said State approved May 3, 1852, concerning the disposal of the five hundred thousand acre grant of lands to said State by Congress, which warrants were issued upon proper application and proceedings, and on their face showed by proper assignments that they belonged to Stephen Franklin during September, 1853; also the following endorsement written across the face of said warrant, viz:

"Located in Santa Clara county for Stephen Franklin, September 6, 1853. Wm. J. Lewis, county surveyor."

60 He also read the following endorsement written across the face of said warrant No. 614, viz:

"Located in Santa Clara county for Stephen Franklin, September 6, 1853. Wm. J. Lewis, county surveyor."

The defendant then offered in evidence two certificates with the endorsement thereon (it being admitted by plaintiff that Wm. J. Lewis was during September, 1853, the county surveyor of the county of Santa Clara, in the State of California), the first of which certificates was in words and figures following, viz:

"This is to certify that I have located school land warrant number six hundred and twelve (612) for 160 acres, issued on the 28th day of July, 1853 (under an 'Act to provide for the disposal of 500,000 acres of land granted to this State by act of Congress' approved May 3, 1852), to James T. Ewing, and by him assigned, on the 6th day of August, 1853, to S. C. Hastings, and by him assigned, on the 1st day of September, to Stephen Franklin, and that the land covered by said warrant is bounded and described as follows:

Beginning at a stake marked F O, which bears north (true course) 30 chains from a stake placed for the northwest corner of section thirty-five, township six, range one west, thence south (true

61 course) 40 chains to a stake marked F 1; thence east (true course) 40 chains to a stake marked F 2; thence north (true course) 40 chains to a stake marked F 3; thence west (true course) 40 chains to the place of beginning, containing one hundred and sixty acres, which is part of 320 acres located in a body for Stephen Franklin, covered by warrants numbered 612 and 614.

Surveyed September 6, 1853. Magnetic variation, 15 deg. 23 min.

WM. J. LEWIS,
County Surveyor, Santa Clara County.

County surveyor's office, San José, September 15, 1853.

On which certificate was the following endorsements, viz:

"Filed at 11½ o'clock a. m., September 24, A. D. 1853, for record in this office. H. C. Melone, county clerk, Santa Clara county, by John B. Hewson, deputy clerk."

Also the following endorsement:

"Recorded on pages 32 and 33, Book of Records for School Land Warrants. H. C. Melone, clerk, by John B. Hewson, deputy clerk."

The second of such certificates was in words and figures following, viz:

62 "This is to certify that I have located school land warrant numbered six hundred and fourteen (614), for 160 acres, issued on the 28th day of July, 1853 (under an 'Act to provide for the disposal of 500,000 acres of land granted to this State by act of Congress' approved May 3d, 1852), to James T. Ewing, and by him assigned, on the 6th day of August, 1853, to J. C. Hastings, and by him assigned, on the 1st of September, 1853, to Stephen Franklin, and that the land covered by said warrant is bounded and described as follows:

Beginning at a stake marked F 1, which is the southwest corner of land covered by school land warrant number 612, and which bears south (true course) 10 chains from a stake planted for the northwest corner of section thirty-five, township six, range one west, thence south (true course) 40 chains to a stake marked F 4; thence east (true course) 40 chains to a stake marked F 5; thence north (true course) 40 chains to a stake marked F 2; thence west (true course) 40 chains to the place of beginning, containing one hundred and sixty acres, which is a part of 320 acres located in a body for Stephen Franklin and covered by warrants numbered 612 and 614.

Surveyed September 6, 1853. Magnetic variation, 15 deg. 23 min.

WM. J. LEWIS,
County Surveyor, Santa Clara County.

63 County surveyor's office, San José, September 15, 1853.

On which certificate was the following endorsements, viz:

"Filed at 11½ o'clock a. m., September 24, A. D. 1853, for record in this office. H. C. Melone, county clerk of Santa Clara county, by John B. Hewson, deputy clerk."

Also the following endorsement:

"Recorded on page 33, Book of Records for School Land Warrants. H. C. Melone, clerk, by John B. Hewson, deputy clerk."

Plaintiff objected to the admission of said certificates or of either of them on the ground that the same and each of them were irrelevant, immaterial, and incompetent. The objection was overruled by the court and the certificates and endorsements thereon were admitted in evidence; to which plaintiff then and there duly excepted.

The defendant then offered in evidence the record of said certificates from a book in the county clerk's office, recorded therein on September 24, 1853, and a certificate at the foot of the record of said warrant 612, in the words and figures following, viz:

"STATE OF CALIFORNIA, }
"*County of Santa Clara,* } *ss:*

64 "I, H. C. Melone, county clerk of Santa Clara county, do hereby certify that the above certificate of location of school land warrant No. 612 is a true and correct copy of the original as filed for record in my office.

"Witness my hand and seal this 30th day of September, A. D. 1853.

"H. C. MELONE, *Clerk*,
"By JOHN B. HEWSON,
"*Deputy Clerk.*"

And a similar certificate at the foot of the record of said warrant No. 614; to which plaintiff objected on the ground that the same was irrelevant, incompetent, and immaterial; which objection was by the court overruled, and such records and said certificates at the foot thereof were allowed to be read in evidence; to which the plaintiff then and there duly excepted.

It was here admitted that H. C. Melone, during the month of September, 1853, was county clerk of Santa Clara county, and that John B. Hewson was his deputy.

The defendant then introduced in evidence pages 34 and 35 of said book of school land warrants from said county clerk's office. Said pages immediately follow the records of certificates 612 and 614 and are in words and figures following, viz:

This is to certify that I have located school land warrant number 615, for 160 acres, issued on the 28th of July, 1853 (under an
65 act to provide for the disposal of 500,000 acres of land granted to this State by act of Congress approved May 3, 1852), to James Ewing and by him assigned on the 6th of August, 1853, to S. C. Hastings and by him assigned on Sept. 1, 1853, to Johnathan Parr, and that the land covered by said warrant is bounded and described as follows: Beginning at a stake marked F 5, planted for the southeast corner of said land covered by school land warrant number 614, thence west (true course) 20 chains to a stake marked F 6; thence south (true course) 11 chains to a stake marked F 7; thence east (true course) 34 chains to a stake marked F 8; thence north (true course) 21 chains to a stake marked F 9; thence east (true course) 6 chains to a stake marked F 10; thence north (true course) 40 chains to a stake marked F 11; thence west (true course) 4 chains to a stake marked F 12; thence north (true course) 17.88 chains to a stake marked F 13; thence west (true course) 16 chains to a stake marked F 14; thence south (true course) 27.88 chains to a stake marked F 2, placed for the southeast corner of land covered by school land warrant number 612; thence south (true course) 40 chains to the place of beginning, containing 160 acres, which is part of 480 acres located in a body and covered by warrants numbered 612, 614, and 615.

Surveyed for Johnathan Parr Sept. 14, 1853. Magnetic variation, 15 deg. 23 min.

66 County surveyor's office, San José, Sept. 15, 1853.

WM. J. LEWIS,
County Surveyor, Santa Clara County.

Filed at 11.30 o'clock a. m. September 24th, A. D. 1853, for record in this office.

H. C. MELONE,
County Clerk of Santa Clara County,
By JNO. B. HEWSON,
Deputy Clerk.

STATE OF CALIFORNIA, }
County of Santa Clara. }

I, H. C. Melone, county clerk of Santa Clara county, do hereby certify that the foregoing certificate of location of school land warrant No. 615 is a true and correct copy of the original as filed for record in this office.

Witness my hand this 30th day of September, A. D. 1853.

H. C. MELONE, *Clerk,*
By JNO. B. HEWSON,
Deputy Clerk.

(Here follows diagram marked p. 67.)

68 I certify that the above plat of the location of school land warrants numbered 612, 614, and 615, for 160 acres each, is correct.

WM. J. LEWIS,
County Surveyor, Santa Clara Co.

County surveyor's office, San José, Sept. 15, 1853.

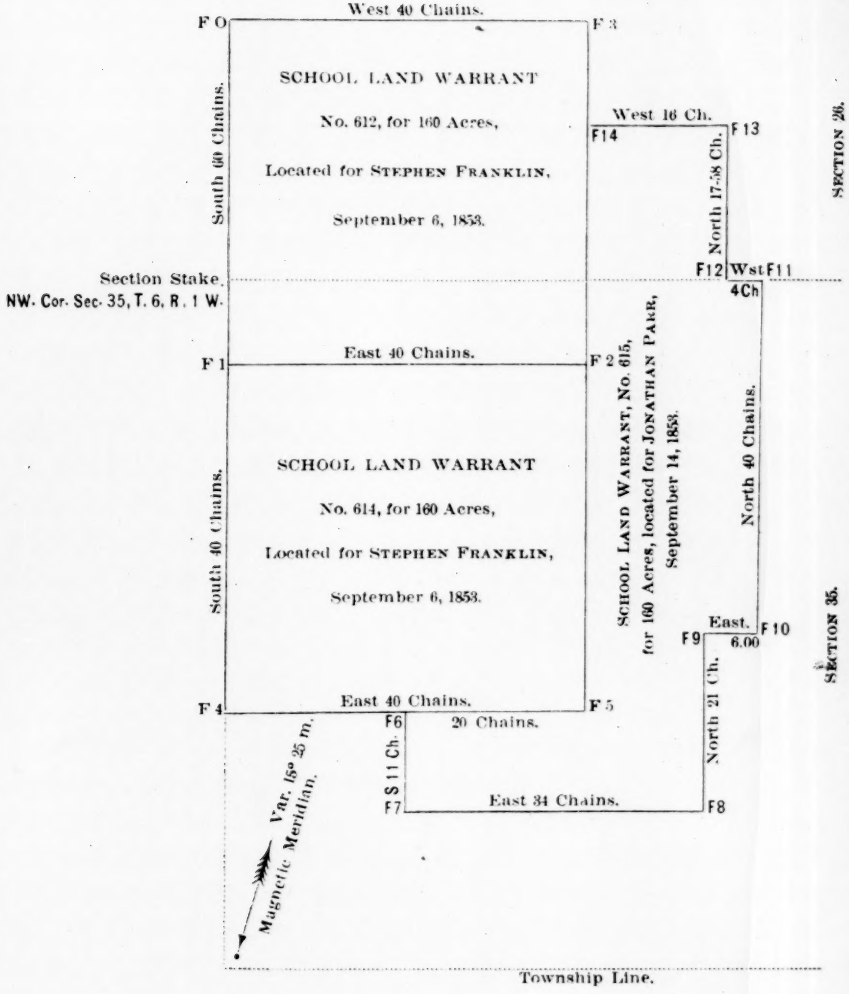
Filed at 11.30 o'clock a. m. September 24, 1853, for record in this office.

H. C. MELONE,
County Clerk of Santa Clara County,
By JNO. B. HEWSON,
Deputy Clerk.

No evidence was given that any other plat was ever made of the survey of the location of any of such land warrants.

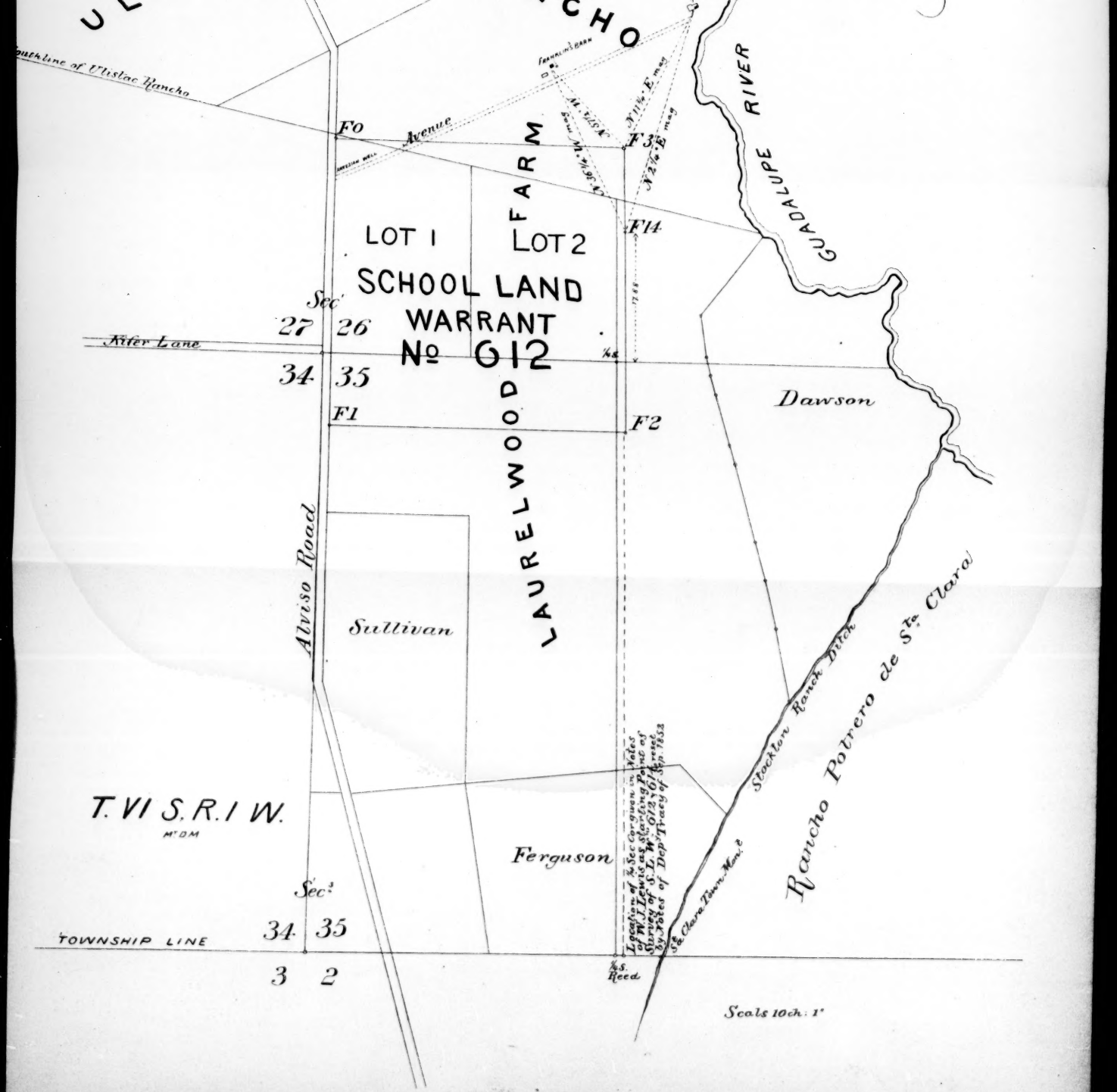
Defendant then offered copies, duly certified, of said certificates of location Nos. 612–614 from the State surveyor general's office, but with which it appeared there was not any plat or map of the surveys therein referred to. To the admission of such copies the same objection, ruling, proceedings, and exception were had and taken as stated in reference to the last offer. No evidence was given of any other warrant, certificate of location of warrant, or record of certificate of location of warrant, or filing of certificate of location of warrant, or filing of copy of certificate of location, or plat or map of any survey referred to in any certificate of location or war-
69 rant relating to or claiming to relate to any of the land sued for in the complaint herein.

A. T. HERRMANN, a competent surveyor, testified for defendant that he was familiar with these premises; that he had found in the county surveyor's office of Santa Clara county the field-notes of said



No. 121.
McNeil
Donahue
} p. 67

No. 121.
McNee
v.
Donohue
p 69


South line of Ulistac Rancho
Avenue
F0
F3
F14
F1
F2
LOT 1
LOT 2
SCHOOL LAND
WARRANT
№ 612
LAUREL WOOD FARM
GUADALUPE RIVER
Sec.
27
26
34
35
Alder Lane
Alviso Road
Sullivan
Dawson
Ferguson
Rancho Potrero de Sta Clara
Stockton Ranch Ditch
Sta Clara Town. Mon.e
T. VI S. R. I W.
M. D. M.
TOWNSHIP LINE
Sec.
34
35
3
2
Scale 10 ch: 1"

Lewis of his survey and location of said land warrants 612 and 614 and the plat herein set out, and that from said plat, certificates herein set out, and said field-notes together he was able to locate and did locate in the field the survey referred to in the certificates as it was actually made in the field; that such survey as actually made included the lands sued for in the complaint, excepting a strip on the westerly side thereof 80 feet wide—63 feet in a road and 17 feet to west of road—and a triangular tract at the northwesterly corner, being about three and one-half acres. "I made a diagram of the location of the warrants, to wit, diagram 'Exhibit 11.'" (Here attach original "Exhibit 11" to original transcript on appeal.)

(Here follows photograph marked p. 69.)

On cross-examination he stated there were three meridians in this State, to wit, San Bernardino, Humboldt, and Mount Diablo; that each meridian had two sets of township ranges, one north and one south, and that the description in the said certificates as it appeared above the surveyor's signature was equally applicable to six
70 different townships in this State; that even as he located the surveys referred to in these certificates from the said field-notes he found that both of the lines running north and south on each survey are 80 feet east of the Government subdivision lines, and both of the lines running east and west are over six hundred feet from such Government subdivision lines; that no stakes could be found. The witness further testified that the land located with the warrants was in township 6 south, and in Santa Clara county, which he fixed from the fact that the county surveyor of Santa Clara county, William J. Lewis, was the only person authorized to make that survey and location; that in Santa Clara county there was no township 6 north, but only one township 6 south, so that it must have been in township 6 south; that the survey is signed by William J. Lewis, county surveyor of Santa Clara county, and from the further fact that the survey and location is found in the public records of Santa Clara county and gives bearings to objects that cannot be mislocated; that the field-notes of the survey refer to Franklin's house and barn; that the witness did not know Mr. Franklin personally, but that the location of Franklin's house and barn were pointed out to him by Mr. Doyle when witness went on the ground; that in the field-notes Franklin is called S. Franklin. It was admitted that these local objects were correctly pointed out to this witness.

71 Being re-examined, the witness testified that he tested the location of the school warrant by relocating the south boundary of the township. The west line of school warrant location just about came up to defendant's fence along the east line of Alviso road; it just about fitted onto it; that fence is the westerly inclosure of the Laurel Wood farm.

It appeared from the evidence herein that but one application from James Donahue to the State of California for the purchase of lands was ever made or offered in evidence.

That application covered the land sued for in the said complaint, and such application complied with the statutory requirements of the statutes under which it purported to be filed, to wit, the act of April 23, 1858, February 18, 1859, and April 22, 1861, and was accompanied with the county surveyor's certificate of survey and location in statutory form.

The affidavit of said James Donahue accompanying said applications is in words and figures following, viz:

Location No. 171, San Francisco land district.

STATE OF CALIFORNIA, }
City and County of San Francisco. }

I, James Donahue, of San Francisco city and county, State of California, being duly sworn, depose and say that I am an
72 applicant for the purchase and location of the above-described lands, and that, to the best of my knowledge and belief, there is no valid claim existing upon the land so described adverse to the claim I hold and apply to be located, and that there is no improvement of any description on said land other than my own.

Witness my hand.

JAMES DONAHUE.

Sworn and subscribed to before me this fourteenth day of February, A. D. 1862.

[SEAL.] HENRY HAIGHT,
Notary Public.

The only affidavit of any witness or witnesses in support of such application or in reference thereto ever made or offered in evidence was in words and figures following, viz:

"We, W. B. Thornburgh and H. H. Haight, of San Francisco county, State of California, being duly sworn, each for himself deposes and says that he is acquainted with the lands described in the above application and sought to be located by the above-named James Donahue; that there is no valid claim existing upon the lands so described adverse to the claim above made to the best of his knowledge and belief, and that he neither has nor expects to have any interest, directly or indirectly, in the claim so desired to be located by said James Donahue.

"Witness our hands.

"W. B. THORNBURGH.
"H. H. HAIGHT."

73 "Sworn to and subscribed before me this 14th day of February, A. D. 1862.

[SEAL.] "HENRY HAIGHT,
"*Notary Public.*

"The defendant offered said affidavit of said witnesses in evidence, to which plaintiff objected on the ground that the same was

irrelevant, incompetent, and immaterial; which objection was overruled by the court, and said affidavit of such witnesses allowed to be read in evidence; to which plaintiff then and there duly excepted.

"Defendant then offered in evidence the following acceptance endorsed upon said application, which is in words and figures following, viz:

"I, Leander Ransom, State locating agent for the San Francisco land district, do hereby accept the above offer under the following conditions: That if said location be made and approved by the State surveyor general it shall be for the use and benefit of the applicant on his complying with all the conditions and provisions of the act for the disposal of the 16th and 36th sections, and lands taken in lieu thereof, donated to the State, approved April 22, 1861.

"LEANDER RANSOM,
"*Locating Agent.*"

OFFICE OF LOCATING AGENT,
SAN FRANCISCO, *Feb.* 15, 1862.

74 To the introduction of such acceptance in evidence said plaintiff objected upon the ground that the same was irrelevant, incompetent, and immaterial; which objection the court overruled and allowed such acceptance to be read in evidence; to which plaintiff then and there duly excepted.

No other acceptance of such application was ever made or offered in evidence.

The said James Donahue in said application sought to purchase $225\frac{80}{100}$ acres (including the land in dispute) in lieu of what was in such application described as the northwest quarter and north half of southwest quarter of section 16, township 6 south, range 1 east, Mount Diablo meridian, and stated in such application that the same was in a private grant. By the terms of such application said James Donahue agreed to pay for said land at the rate of $1.25 per acre.

The defendant then proved that thereafter said locating agent made his certificate, bearing date the 27th day of March, 1862, in the words and figures following, viz:

"*Grant of the Sixteenth and Thirty-sixth Sections for School Purposes.*

"San Francisco land district, location No. 180.

"STATE OF CALIFORNIA,
"LOCATING AGENT'S OFFICE.

"I hereby certify that in accordance with the provisions
75 of an act entitled 'An act to provide for the location and sale of the unsold portion of the five hundred thousand acres of land donated to the State for school purposes, and the seventy-two sections donated to this State for the use of a seminary of learning,' approved April 23, 1858, and of the acts amendatory thereof, approved February 18, 1859, and April 22, 1861,

"And with the instructions of the Governor, I have located, as a portion of the school lands, two hundred and forty acres of public land in the county of Santa Clara at the request and for use of James Donahue. Said land is described as follows: The fractional southwest quarter of section twenty-six, and the north half of northwest quarter of section thirty-five, and southeast quarter of northwest quarter of section thirty-five, in township six south, range one west, Mount Diablo meridian.

"Taken in lieu of the northwest quarter and north half of southwest quarter of section sixteen, township six south, range one east, Mount Diablo meridian.

"An application for this location has been made by me, in the name and for the benefit of the State of California, at the U. S. land office for the San Francisco district, in the city of San Francisco, and the same has been filed by Geo. B. Tingley, register of
76 said district, but he refuses to recognize the same until the certified plats of the survey of said township shall be deposited in his office by the U. S. Surveyor General, and the same is entered and numbered upon my register of location accordingly.

"Witness my hand, at office in San Francisco, this 27th day of March, 1862.

"LEANDER RANSOM,
"*State Locating Agent for the San Francisco Land District.*"

And the register of said United States land office not having certified said land over to the State of California within thirty days after February 15, 1862, said locating agent made his return accordingly to the surveyor general of the State of California, who, after the expiration of sixty days, to wit, on the 28th day of July, 1862, did make and execute his certificate in the words and figures following, viz:

"SURVEYOR GENERAL'S OFFICE,
"SACRAMENTO, *28th day of July*, 1862.

"The above location is hereby approved, and the treasurer of Santa Clara county shall receive in payment therefor from James Donahue eighty-four ($84) dollars within fifty days from the record of the surveyor general's approval, being twenty per cent. of the purchase-money and one year's interest on the balance in
77 advance at the rate of ten per cent. per annum from the date of location in the locating agent's office.

"J. F. HOUGHTON,
"*Surveyor General.*"

Which papers, except the one secondly above set out, bear the following endorsement, viz:

"Certificate of purchase, January, 1863.
"Unsurveyed lands, Santa Clara county.
"Grant of the 16th and 36th sections for school purposes.
"San Francisco land district.
"Location No. 180.

"Mount Diablo meridian.

"Township No. 6 south, range 1 west.

"Section—Frac. S. W. ¼ of 26, N. ½ of N. W. ¼ of 35, S. E. ¼ of N. W. ¼ of 35.

"Taken in lieu of N. W. ¼ and N. ½ of S. W. ¼ of sec. 16.

"In township No. 6 south, range No. 1 east, Mount Diablo meridian.

"Containing 225.80 acres in lieu of 240 acres.

"Located for James Donahue by Leander Ransom, locating agent.

"Received and filed May 27, 1862.

"Approved July 28, 1862.

"J. F. HOUGHTON,
"*Surveyor General*,
"Per A. S. BENDER, *Deputy*."

78 That thereupon, on the 22d of November, 1863, said James Donahue received a certificate of purchase for said land and other land in the words and figures following, viz:

Grant of 16th and 36th Sections—Unsurveyed Lands.

"Certificate of purchase.

"No. 479. STATE LAND OFFICE
"OF THE STATE OF CALIFORNIA,
"SACRAMENTO, *14th day of January*, 1863.

"It appearing from the certificate of the county treasurer, bearing date the 22d of November, A. D. 1862, that James Donahue has paid to the State of California the sum of eighty-four dollars, being twenty per cent. of the purchase-money and first year's interest on the balance in advance for two hundred and forty acres of State school land, described as follows in location No. 180 of unsurveyed lands, San Francisco land district: Fractional S. W. ¼ of section 26, and N. ½ of N. W. ¼ of section 35, and S. E. ¼ of N. W. ¼ of section 35, in township No. 6 south, range No. 1 west, Mt. Diablo meridian:

"Now, therefore, be it known that the said James Donahue, having made payment of said twenty per cent. and first year's interest for the above-described tract of land, under the provisions of an act entitled 'An act amendatory of and supplemental to an act to provide for the location and sale of the unsold portion of the
79 five hundred thousand acres of land donated to the State for school purposes, and the seventy-two sections donated to the State for the use of a seminary of learning, approved April 23d, 1858, and to the act amendatory thereof, approved February 18, 1859,' is the purchaser of the same; and after full payment has been made, on presentation of the State register's certificate for a patent to the Governor of the State of California, the said James Donahue or his assigns shall be entitled to receive a patent for the same.

"225.80 acres taken for 240 acres.

"Balance of purchase-money due, 240 dollars.
"Interest to be computed from March 27th, 1862.
"In witness whereof the register of said land office has hereunto set his hand and affixed his seal of office the day and date above mentioned.

[SEAL.] "J. F. HOUGHTON,
"*Register State Land Office,*
"Per A. S. BENDER, *Deputy.*

"Act of April 22d, 1861.
"Interest, ten per cent. per annum in advance."

And upon which certificate is the following endorsement, viz:

"TREASURER'S OFFICE, SANTA CLARA COUNTY,
"SAN JOSÉ, *January* 20, 1864.

"Received of James Donahue two hundred and forty dol-
80 lars, being full amount of principal and forty-eight dollars in full for interest on the within certificates.

"C. W. POMEROY,
"*County Treasurer.*

"Principal	$240 00
"Interest	48 00
	$288 00"

Which certificate of purchase was recorded in the office of the recorder of said county of Santa Clara on the 3d day of April, 1874.

That thereafter, in May, A. D. 1866, said township No. six south, wherein the land in question was situated, was for the first time surveyed under and by virtue of the laws of the United States, and the plat of such survey was returned and filed in the United States land office of the district embracing said township on the 19th day of May, 1866.

Thereupon, to wit, on the 30th day of May, 1866, said locating agent delivered his application in writing to the register of said land office, which application was received and forwarded to the Commissioner of the General Land Office by said register the same day, and which application was and is in the words and figures following (omitting description of certain other lands described therein), viz:

81 "(*Surveyed Lands.*)

"Grant of the sixteenth and thirty-sixth sections for school purposes.

"STATE OF CALIFORNIA, }
"*San Francisco Land District.* }

"OFFICE OF THE STATE LOCATING AGENT,
"SAN FRANCISCO, *May* 30, 1866.

R
"No. 171.

"Under the provisions of an act of the California legislature, approved April 22, 1861, and April 27, 1863, providing for the sale of the 16th and 36th sections, I hereby apply in behalf of the State of California for the following-described tracts of land in lieu of N. W. ¼ and N. ½ of S. W. ¼ of section 16, in township No. 6 S., range No. 1 E., Mount Diablo meridian, which the State is compelled to relinquish from the fact that it is included in a private grant, to wit: N. ½ of N. W. ¼, S. E. ¼ of N. W. ¼, of section 35; also lot No. 1, 57.75 acres, and lot No. 2, 49.09 acres, in section 26, township 6 S., range 1 W., Mount Diablo meridian.

"NOTE.—This selection was made on the 27th day of February, 1862, from a survey executed by the county surveyor, and notice of said selection was filed in the United States register's office at the time. A plat of survey of the township having been recently filed in the United States register's office by United States surveyor
82 general, an application is now hereby made that the same be marked on said plat and more formally entered.

* * * * * * *

"The above-described lands are selected for said State under the 6th and 7th sections of the act of Congress entitled 'An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes,' approved March 3d, 1853. The said tracts contain 226.84 and 160 acres, which I agree, as agent of said State, to accept for and in lieu of the full amount of 400 acres.

"LEANDER RANSOM,
"*Locating Agent.*"

Thereafter the register of the land office of the State of California, on the 9th day of April, 1867, delivered his letter under his hand, bearing date that day, addressed to the register of the United States land office of the district wherein said land was situated, which letter was received by said register of the United States land office on the 10th day of April, 1867, which letter, so far as the same relates to the land in question, together with all endorsements thereon, was and is in the words and figures following, viz:

"Filed in U. S. land office April 10, 1867. J. W. Shanklin, register.

83 "STATE OF CALIFORNIA,
"OFFICE OF SURVEYOR GENERAL AND
"REGISTER OF THE STATE LAND OFFICE,
"SACRAMENTO, *April* 9, 1867.

"To Hon. James W. Shanklin, register of the United States land office, San Francisco district.

"SIR: I hereby notify you that all the lands described in the annexed list as having been selected and located upon in behalf of the State of California had prior to the passage of an act of Congress entitled 'An act to quiet land titles in California,' approved July 23, 1866, been selected and disposed of to purchasers in good faith by said State as a part of the sixteenth and thirty-sixth sections, and lands in lieu thereof granted by an act of Congress approved March 3, 1853, entitled 'An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes;' and in behalf of said State I hereby claim said lands so selected and disposed of as aforesaid as having inured to the State, unless at the date of the passage of the act first above named adverse pre-emption, homestead, or other rights had been acquired thereon by settlers under the laws of the United States, or unless the same had been reserved for naval, military, or Indian purposes by the United States, or unless the same was mineral land,
84 or unless the same was held or claimed under a valid Mexican or Spanish grant, or unless the same was included within the limits of a city, town, or village or within the county of San Francisco; and concerning all of said lands not thus excepted from the operation of the said confirmatory provisions of section one of the act first above named I request that when the same shall have been surveyed by the United States or if the same have been so surveyed already that you make the proper entries upon your maps and records to indicate the title of the State to those legal subdivisions established by the United States which nearest conform to the identical tracts included and described in the State's survey and selection and forward lists of the same to the department at Washington for final approval and authentication of the title of the State.

[Seal of State Land Office, California.]

[Seal of Surveyor Gen'l's Office, State of Cala.]

"J. F. HOUGHTON,
"*Surveyor General and Register.*"

San Francisco Land District.

List of unsurveyed lands selected and disposed of to purchasers in good faith by the State of California as part of the sixteenth and thirty-sixth sections and lands in lieu thereof granted by act of Congress approved March 3, 1853, and confirmed to the State by act of Congress entitled "An act to quiet land titles in California," approved July 23, 1866.

85

Date of selection.	Part of section.	Sec.	Tp.	Range.	Meridian.	Area in acres.	Remarks.
Mar. 27, 1862	S. W. frac'l ¼	26	6 S.	1 W.	Mt. D'blo.	225.80	
	N. ½ of N. W. ¼	35	"	"	"		
	S. E. ¼ of N. W. ¼	"	"	"	"		
In lieu of	N. W. ¼	16	6 S.	1 E.	"		
	N. ½ of S. W. ¼	"	"	"	"		

The evidence showed at the time of the passage of the act of Congress entitled "An act to quiet land titles in California," approved July 23, 1866, no pre-emption claim, homestead or other right to lands in question adverse to the defendant or those under whom he claims had been acquired by any settler under the laws of the United States, nor had said lands been reserved for naval, military, or Indian purposes by the United States, nor was the same mineral land, nor was it held or claimed under any Mexican or Spanish grant, nor was it included within the limits of any city, town, or village.

The evidence showed that the amount W. W. Johnston and his assignee (the plaintiff herein) paid the regents of the University of California for said land sued for herein was as principal the sum of $667.75, of which sum the sum of $133.55 was so paid to the regents on behalf of the State of California, to be paid to the United States by the regents for the State of California as excess money on account of said lands being double minimum lands, twenty per cent. of which purchase price was paid at the time of said purchase, and the balance, with interest, was paid on or before the 17th of June, 1882.

86 The evidence further showed that the plat of township six south, range 1 east, Mount Diablo meridian, was first filed in the United States land office on May 1, 1872, and that such plat was the first plat of that township filed in such office.

The evidence further showed that on January 22, 1879, instructions issued from the Commissioner of the General Land Office at Washington to the register and receiver at San Francisco not to receive any further selections on account of any grant to the State of California.

No evidence was introduced showing or tending to show that any location of any 500,000-acre land warrant upon any part of the land in dispute was ever called to the attention of any office or officer of the United States.

No evidence was introduced showing or tending to show that any evidence was ever offered by any one to any office or officer of the

United States that any part of said land described in said complaint had been disposed of by the said State of California to any purchaser, or that any statement was ever made by any one to an office or officer of the United States that said State had ever sold or disposed of any part of said land to any purchaser, except as herein shown.

87 And the plaintiff now specifies the following particulars wherein the evidence is insufficient to justify or support the decision or findings herein, viz:

1st. The evidence is insufficient to justify or support the finding that Stephen Franklin located any warrant or warrants upon any part of the land sued for herein.

2d. The evidence is insufficient to justify or support the finding that an entry of any location upon said lands sued for herein or any part thereof was made in the clerk's office of Santa Clara county.

3d. The evidence is insufficient to justify or support the findings that the county surveyor gave a certificate setting forth the bounds of a location of a warrant.

4th. The evidence is insufficient to justify or support the finding that the county clerk recorded a certificate which gave the bounds of a location.

5th. The evidence is insufficient to justify or support the finding that a plat of a survey was forwarded to the office of the surveyor general of the State of California.

6th. The evidence shows that no school land warrant was ever located upon the lands sued for in the complaint herein or any part thereof, and the evidence is insufficient to justify the or

88 any finding to the contrary, and in this particular the decision is not justified by the evidence.

7th. The evidence is insufficient to justify or support the finding that the State of California, under the act of Congress approved March 3rd, 1853, selected the land sued for in the plaintiff's complaint herein or any part thereof.

8th. The evidence is insufficient to justify or support the finding that the State of California sold or disposed of said lands described in said complaint to James Donahue.

9th. The evidence is insufficient to justify or support the finding that James Donahue purchased of said State said lands described in said complaint or any part thereof.

10th. The evidence is insufficient to justify or support the finding that James Donahue paid for said land.

11th. All the evidence tends to show and does show and conclusively establish that said State never sold or disposed of any part of said lands described in said complaint to said James Donahue, and the evidence is insufficient to justify the or any finding that it did, and in this particular the decision is not justified by the evidence.

12th. The evidence all goes to show and establish and does show and establish that James Donahue never purchased any part of said land from the said State, either in good faith or under

89 her laws or otherwise, and the findings to the contrary is not justified by the evidence.

13th. The evidence is insufficient to justify or support the finding that said State issued a certificate of purchase to James Donahue for said lands or any part thereof.

14th. The evidence is insufficient to justify or support the finding that the said State selected or located or relocated any of said lands in satisfaction of said act of Congress approved March 3, 1853.

15th. The evidence is insufficient to justify or support the finding that the register of the United States land office was notified of such selection or relocation.

16th. The evidence is insufficient to justify or support the finding that such notice was forwarded to the General Land Office of the United States.

17th. The evidence is insufficient to justify or support the finding that the register of the United States land office was notified that said land had been disposed of by the State to a purchaser under her laws.

And the plaintiff now specifies and assigns the particular errors of law occurring at the trial and excepted to by plaintiff and by reason of which he asks a new trial herein, viz:

90 1st. The court erred in admitting the two certificates signed by Wm. J. Lewis, or either of them, for they and each of them were incompetent, irrelevant, and immaterial.

2d. The court erred in admitting in evidence the record of said certificate, or of either of them, in the county clerk's office, for the same was incompetent, irrelevant, and immaterial.

3d. The court erred in admitting in evidence the copies of said certificates, or either of them, from the State surveyor general's office, for the same were incompetent, irrelevant, and immaterial.

4th. The court erred in admitting in evidence the affidavit of the witnesses made to support the application of James Donahue to the State to purchase the lands, in dispute herein, for the same was incompetent, irrelevant, and immaterial.

5th. The court erred in admitting in evidence the acceptance of the State locating agent purporting to accept the said offer or application of James Donahue to purchase said lands, for the same was incompetent, irrelevant, and immaterial.

And the plaintiff specifies that the decision herein is against law in this, that upon the findings herein plaintiff was entitled to judgment, and the decision is against law in that upon said findings it orders judgment for defendant instead of for plaintiff.

91 And the plaintiff proposes the foregoing as a correct statement on motion for a new trial herein.

S. F. LEIB,
Att'y for Plaintiff.

T. H. LAINE, *Of Counsel.*

I hereby certify that the foregoing statement, after being prepared, served, and presented in due time, has been settled by me after due and regular proceedings therefor, and the same is now by me allowed, and I certify that the same is correct.

D. BELDEN,
Superior Judge.

Dated June 10, 1885.

Endorsed: Filed June 10, 1885. M. J. Ashmore, clerk.

(Title of Court and Cause.)

Extracts from Minutes of Court of June 11th, 1885.

The plaintiff's motion for a new trial came on regularly to be heard this the 11th day of June, A. D. 1885, and the same was argued by the counsel for the respective parties upon its merits and was there submitted to the court for decision.

And the court, being advised, now orders that the said motion be, and the same hereby is, denied; to which the plaintiff now in open court duly excepts.

92 (Title of Court *of* Cause.)

Notice of Appeal.

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this State from the judgment therein made and entered in the said superior court on the 8th day of July, A. D. 1884, in favor of the defendant in said action and against said plaintiff, and from the whole thereof, and also from the order of said court made and entered herein on June 11, 1885, denying plaintiff's motion for a new trial herein.

Dated this 13th day of June, 1885.

Yours, etc.,

S. F. LEIB,
Attorney for Plaintiff.

T. H. LAINE, *Of Counsel.*

To the clerk of the superior court and Messrs. Doyle, Barber, Galpin & Scripture, attorneys for defendant.

Endorsed: Received a copy of the within notice of appeal in the action of John H. McNee *vs.* P. J. Donahue this 13th day of June, A. D. 1885, and the undertakings on appeal in such action are hereby waived. Doyle, Barber, Galpin & Scripture, defendant's attorneys. Filed June 13, 1885. M. J. Ashmore, clerk.

93 It is hereby stipulated that the foregoing transcript on appeal is correct, but this stipulation is made subject to the correction of any errors therein, if any should be hereafter discovered.

S. F. LEIB, *Attorney for Plaintiff.*
T. H. LAINE, *Of Counsel.*

DOYLE, BARBER, GALPIN AND SCRIPTURE,
Attorneys for Defendant.

Received copy of within transcript this June 15th, 1885.

DOYLE, BARBER, GALPIN & SCRIPTURE,
Att'ys for Respondent.

94 *Submission of Cause.*

In the Supreme Court of the State of California, Department Two.

McNEE
v.
DONAHUE. } 11107.

1888.
March 7. Ordered submitted on briefs on file.

THE COURT.

(Title Court and Cause.)

1888.
June 23. Filed petition for rehearing.

Title Court and Cause.

1888.
June 28. Rehearing denied.

95 In the Supreme Court of the State of California, Department Two.

JOHN H. McNEE, Appellant,
vs.
P. J. DONAHUE, Respondent. } No. 11107. On Appeal from the Superior Court in and for the County of Santa Clara.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court; whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Santa Clara in the above-entitled cause be, and the same are hereby, affirmed.

96 *Opinion.*

Department Two.

(Filed June 9, 1888.)

McNEE
vs.
DONAHUE. } No. 11107.

The plaintiff sues in ejectment for 106.24 acres of land in Santa Clara county. The defendant denied the material allegations of the complaint and put in a cross-complaint, praying for a conveyance from the plaintiff. The court below gave judgment for the defendant, as prayed for, and the plaintiff appeals.

The facts are substantially as follows:

In September, 1853, one Stephen Franklin was the owner of two land warrants issued under the act to provide for the disposition of 500,000 acres of land granted to the State by act of Congress, for

which warrants full value was paid; and in said month he located the same upon the tract in controversy, which was then vacant and unappropriated public land of the United States. At the time of such location said Franklin was in the actual possession of said tract, with certain adjoining land, making 578 acres in all. The dwelling-house and barns were on the adjoining land. On the tract in controversy was an artesian well, with ditches for carrying water from the same. The whole was under one general inclosure and was cultivated as a single farm. Franklin remained in possession until 1862, when his interest was acquired by James Donahue, the father of the defendant.

In 1862 the tract in controversy was selected by the State as lieu lands. In that year Donahue (who was then in possession) purchased from the State "in good faith" and paid the full purchase price therefor, and on January 22, 1864, the State issued and delivered to him a certificate of purchase of said lands. He continued in possession until his death, "in the year 1864 or 1865." The defendant then succeeded to the interest of his father, and ever since remained and was at the commencement of the action in the actual possession of said tract.

The land was not surveyed by the authority of the United States until May, 1866, when it was surveyed and located in township 6 S., range 1 W., Mount Diablo meridian. It will be observed that this was before the passage of the act of July 23, 1866, "to quiet land titles in the State of California" (vol. 14, U. S. Stat., p. 218). That act contained, among other things, the following provisions:

SEC. 1. "That in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress and has disposed of the same to purchasers in good faith under her laws, the land- so selected shall be, and are hereby, confirmed to said State." Then follows certain exceptions which we do not think apply to the present case. (See Tr., fol. 945; Whitney *vs.* Morrow, 112 U. S., 693.)

SEC. 2. "And be it further enacted, That where the selections named in section 1 of this act have been made on land- which have been surveyed by authority of the United States it shall be the duty of the proper authorities of the State, when the same has not already been done, to notify the register of the United States land office for the district in which the land is located of such selection, which notice shall be regarded as the date of the State selection; and the Commissioner of the General Land Office shall immediately after the passage of this act instruct the several local registers to forward to the General Land Office after investigation and decision all such selections, which, if found to be in accordance with section 1 of this act, the Commissioner shall certify to the State in the usual manner."

Section 3 relates to selections upon unsurveyed lands, and gives directions concerning the making of the surveys. Section 4 relates to swamp and overflowed lands, and the remaining sections relate to matters which are not material to be considered.

The court finds that the proper authorities of the State had notified the register of the United States land office, etc., on May 30, 1866, which was before the passage of the act and therefore within the clause "when the same has not already been done," above quoted. Apparently, to make matters sure, the State authorities gave another notice after the passage of the act, "which notice was received by the register of the said United States land office and filed by him on the 10th day of April, 1867." But it does not appear that the Commissioner of the Land Office ever certified the land over to the State, as directed by section 2, above quoted.

So much for the basis of the defendant's claim. The plaintiff claims the land under a selection by the State in September, 1873, as part of the agricultural college grant. The purchase price was fully paid by plaintiff and his assignors. On June 1, 1882, the United States issued and delivered a patent for the land to the State, and on the 17th day of June the State issued and delivered her patent to the plaintiff.

We think the act of 1836 operated as a grant *in præsenti*. A confirmatory act operates as a grant. "That a grant may be made by a law as well as a patent pursuant to a law is undoubted (6 Cranch, 128); and a confirmation by law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*." (Strother *vs.* Lucas, 12 Peters, 454; Choteau *vs.* Eckhart, 2 How., 372–'73; Grignon's Lessee *vs.* Astor, 2 How., 319; Langdau *vs.* Hanes, 21 Wall., 521; Maxwell Land Grant case, 122 U. S., 365; *ib.*, 121 U. S., 325).

And in construing grants the words "is hereby granted" operate as a grant *in præsenti*. In Leavenworth, etc., R. R. *vs.* U. S. (92 U. S., 741) the court, per Davis, J., said of the grant there in question: "It creates a present interest and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation, and import a grant *in præsenti*. This court has held that they can have no other meaning; and the Land Department, on this interpretation of them, has uniformly administered every previous similar grant." (And to the same effect: Mo. R'y Co. *vs.* Kans. Pac. R'y Co., 97 U. S., 496; Railroad Company *vs.* Baldwin, 103 U. S., 429; Van Wyck *vs.* Knevals, 106 U. S., 365; Wright *vs.* Roseberry, 121 U. S., 500.)

Now, the words "is hereby confirmed," used in the act under consideration, are words of present confirmation; and if "confirmed" means "granted," as is above shown, they must be words of present grant; and they were so construed in Ryan *vs.* Carter (93 U. S., 78). Such a construction goes much further toward carrying out the purpose of the act, which was to "quiet" land titles, than one which would vest no right in the State or in the purchases from her in good faith, but which simply offers a privilege of purchase. The latter construction, as it seems to us, would tend to open the door to those who go prowling around for flaws in their neighbor's titles.

It makes no difference that the State authorities were required to notify the register of the selections "when the same has not already been done." Such notice had already been given at the date of the

passage of the act (Tr., fol., 92–'3). In the language of the statute "the same had already been done;" and the second notice (Tr., fol., 93–'4), which was probably given out of abundance of caution, did not affect the validity of the first notice. The provision of the act is that the time of said notice "shall be regarded as the date of the State selection;" and in view of the fact that the notice had already been given it follows that it must be held that there was a valid selection as of a date prior to the passage of the act. But if this were not the case—that is to say, if the second notice (given after the passage of the act) is to be taken as the notice in the case—it would not, in our opinion, affect the question as to the operation of the act as a grant *in præsenti*. The case, we think, would be like that of railroad grants, which, although the lands cannot be identified until the road is located and the map filed, yet, nevertheless, operate as grants *in præsenti*, and upon the location of the road and filing of the map relate back to the passage of the act. "In that sense we say that the grant is one *in præsenti*. It cuts off all claims * * * to any portion of the lands from the date of the act, and passes the title as fully as though the sections had then been capable of identification." (Van Wyck *vs.* Knevals, 106 U. S., 365; Railroad Co. *vs.* Baldwin, 103 U. S., 429; Mo. R'y Co. *vs.* Kan. Pac. R'y Co., 97 U. S., 496–'7; Leavenworth R. R. *vs.* U. S., 92 U. S., 741; Schulenberg *vs.* Harriman, 21 Wall, 60; see also Wright *vs.* Roseberry, 121 U. S., 500, and Lessieur *vs.* Price, 12 How., 76.)

Nor does it make any difference that the Commissioner of the General Land Office (on receiving the notices above mentioned from the various registers), "if he finds them to be in accordance with section 1 of this act, is directed to certify them over to the State in the usual manner." This merely furnishes record evidence of the selection and identification; and this purpose is not at all affected by the fact that the land officers are to first investigate whether the selections came within the purview of the act. Even if a patent had been required to be issued it would not have operated to transfer the title which had already been passed. As was said by the court, per Field, Jr., in Whitney *vs.* Morrow (112 U. S., 695): "If by a legislative declaration a specific tract is confirmed to any one, his title is not strengthened by a subsequent patent from the Government. That instrument may be of great service to him in proving his title, if contested, and the extent of his land, especially when proof of its boundaries would otherwise rest in the uncertain recollection of witnesses. It would thus be an instrument of quiet and security to him, but it could not add to the validity and completeness of the title confirmed by the act of Congress." (See also Langdeau *vs.* Hanes, 21 Wall., 529.)

This construction is not inconsistent with the cases of Toland *vs.* Mandell (38 Cal., 30) and Collins *vs.* Bartlett (44 Cal., 371). Those decisions related to unsurveyed lands, and, consequently, were under the third section of the act under consideration. The second section of the act relates to surveyed lands (by which we understand lands surveyed under the authority of the United States at

the date of the act) and is somewhat different from the third section relating to unsurveyed lands.

The correctness or incorrectness of those decisions, therefore, is not involved here. The case of Hodapp *vs.* Sharp (40 Cal., 69), so far as we can ascertain from the report, seems to have been under the second section, and the court reached a different conclusion from that at which we have arrived. It held that the provision that the selections "shall be, and are hereby, confirmed to said State," as used in the act, mean that the selection "is not confirmed, and title does not pass to the State until the land is certified over to the State" (p. 73). This seems to us to be contrary to the Federal decisions above cited, which, of course, in a matter of this kind, are of paramount authority.

If our construction of the act of 1886 is the true one, the legal title passed to the State; and it seems clear that, if it did, she held it in trust for the purchasers mentioned in the act, and could not dispose of it to others. The whole purpose of the act was to quiet the titles of those who had purchased from the State in good faith. The predecessors of the defendant had done all that was required of them, and, consequently, had the beneficial interest. They could be in no worse position than that of settlers upon public lands who have complied with all the conditions required of them; and, as was said by Bradley, J., delivering the opinion in Wirth *vs.* Branson (98 U. S., 121): "The rule is well settled by a long course of decisions that when public lands have been surveyed and placed in the market or otherwise opened to private acquisition a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void unless the first location or entry be vacated and set aside. This was laid down in the case of Lytle *vs.* The State of Arkansas (9 How., 314) and has ever since been adhered to. (See Stark *vs.* Storrs, 6 Wall., 402). Subsequent cases which have seemed to be in conflict with these have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent; such as the payment of the price, the payment of the fees of surveying, or the like." (See also Simmons *vs.* Wagner, 101 U. S., 261).

If the State held the land in trust for the predecessor of the defendant, she could not dispose of it to the plaintiff. (Van Wyck *vs.* Knevals, 106 U. S., 365.)

The cases of Wirth *vs.* Branson and Simmons *vs.* Wagner, above cited, seem to hold that a subsequent patent from the State in violation of the rights of "the equitable owner" is absolutely void; but for the purposes of the present case it is immaterial whether the legal title passed to the plaintiff by the State patent or not. If it did pass to him he took it with a trust in favor of the defendant. If what we have endeavored to show above be correct, the defendant was the equitable owner, and it is found that the plaintiff had notice of the defendant's rights.

The plaintiff's counsel asks, "On what theory has a trust been declared and fastened on us?" The theory is plain: "When the legal title has passed from the United States to one party, where in equity and in good conscience and by the laws of Congress it ought to go to another, a court of equity will convert the holder into a trustee of the true owner and compel him to convey the legal title." (Rector *vs.* Gibbon, 111 U. S., 291.)

If, on the other hand, the legal title did not pass to the plaintiff, his patent constitutes a cloud upon the defendant's right, which he is entitled to have removed. In this regard the case of Van Wyck *vs.* Knevals, 106 U. S., 370, is precisely in point; and we may say of the defendant here (who is a cross-complainant) as was said in that case: "The existence of the patent embarrasses the assertion of the complainant's rights—that is, it prevents him from obtaining a strictly legal title, which would enable him to recover possession of the premises by an action at law. The existence of the patent also creates a cloud upon the title of the land. * * * The existence of the patent, therefore, under these circumstances, furnishes ground for equitable relief. That relief, however, should properly be limited to a decree declaring the equity of the complainant, the invalidity of the title of the defendant, and enjoining him from the assertion of any claim to the property under the patent; but inasmuch as no objection is taken to the form of the decree as entered, which requires the defendant to execute a conveyance of the premises to the complainant, and as the execution of such a conveyance, amounting in fact to a release of his claim to the property, will accomplish all that could be legally effected, it is not considered necessary to order a modification of it."

It is unnecessary to give any extended notice to the argument that the patent from the United States to the State conveyed the land in trust for the purposes of an agricultural college and could not be diverted from such purposes. In the first place it is doubtful whether a trust is fastened upon the State by reason of the agricultural land grant. (Compare Emigrant Co. *vs.* County of Adams, 100 U. S., 61.) In the second place the title did not pass to the State under the patent from the United States, but under the previous act of 1866.

Several other points are made in the somewhat discursive brief of the learned counsel for the appellant. We have examined them all, but do not think they require special notice.

We therefore advise that the judgment and order denying a new trial be affirmed.

HAYNE, *C.*

We concur.

BELCHER, *C. C.*
FOOTE, *C.*

The COURT: For the reasons given in the foregoing opinion the judgment and order are affirmed.

97 UNITED STATES OF AMERICA, *ss:*

To Peter J. Donahue, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 8th day of October, A. D. 1888, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein John H. McNee is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Niles Searls, chief justice of the supreme court of the State of California, this 10th day of July, A. D. 1888, and of the Independence of the United States the one hundred and thirteenth.

NILES SEARLS,
Chief Justice Supreme Court, State of California.

Endorsed: Original. 11107. In the Supreme Court of the United States. John H. McNee, pl'tf in error, *vs.* Peter J. Donahue, def't in error. Citation. Filed July 18, 1888. J. D. Spencer, clerk, by Frank Myers, deputy.

Personal service admitted July 18, 1888.

DOYLE, BARBER, GALPIN & SCRIPTURE,
Att'ys for Def't in Error.

98 Supreme Court of the United States.

JOHN H. MCNEE, Plaintiff in Error,
vs.
PETER J. DONAHUE, Defendant in Error.

Know all men by these presents that we, of the city & county of San Francisco, State of California, are held and firmly — unto Peter J. Donahue in the sum of five hundred dollars, to be paid to the said Peter J. Donahue, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this 10th day of July, A. D. 1888.

Whereas the above-named John H. McNee hath prosecuted a writ of error to the Supreme Court of the United States to reverse
99 the judgment rendered in the above-entitled action by the supreme court of the State of California, in which action the said John H. McNee was plaintiff and the said Peter J. Donahue was defendant: now, therefore, the condition of this obligation is such that if the above-named John H. McNee shall prosecute his said writ of error to effect and answer all costs and damages if he fail

to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

F. A. HYDE. [SEAL.]
MAX GOLDBURG. [SEAL.]

Signed, sealed, and delivered in presence of—
M. F. REILLY.

100 In the Supreme Court of the United States on Writ of Error from the Supreme Court of the State of California.

JOHN H. MCNEE, Plaintiff in Error,
vs.
PETER J. DONAHUE, Defendant in Error.

Assignment of Errors.

The plaintiff in error, John H. McNee, hereby assigns the following errors committed by the supreme court of the State of California in this cause by its final decision herein, viz:

First.

Said supreme court of the State of California in its said decision held and decided that the listing of the United States to the State of California of the lands in controversy herein made in November, A. D. 1871, and the patent of the United States to said State of said lands, dated June 1st, 1882, both said listing and patent purporting to transfer said land to said State under the act of the Congress of the United States entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanical arts," approved July 2nd, 1862, were nugatory and worthless and conveyed and transferred no title to or right in said lands to said State, because the United States at and previous to said listing had no title or right to any of
101 said lands to convey to said State under the said act of Congress approved July 2nd, 1862. In thus holding and deciding the said supreme court of said State committed error; for, at the time of said listing, said United States did have the title to said lands, and by said listing and patent did convey and transfer the title to said lands to said State under said act of Congress approved July 2nd, 1862.

Second.

By said decision said supreme court of said State held and decided that the plaintiff herein acquired nothing by his patent from said State for said lands, dated June 17th, 1882, because the said State acquired no right or title thereto by said listing or patent from the United States. In thus holding and deciding the said supreme court of said State committed error, for by said listing and patent from the United States the said State did acquire the title to said lands and therefore could and did by its said patent to said plaintiff convey the title thereto to said plaintiff.

Third.

By said decision said supreme court of said State held and decided that said plaintiff should execute a deed of conveyance of said lands to the defendant in error. In thus holding and deciding the said supreme court of said State committed error, for compelling said plaintiff to execute such conveyance would be violating
102 the Constitution of the United States and particularly section one of the 14th Amendment thereof by depriving said plaintiff of his property without compensation therefor or due process of law.

Fourth.

The State of California accepted the benefits of said act of Congress approved July 2nd, 1862. It thereby entered into a contract with the United States that it would not use lands acquired by virtue of said act for any other purpose than that specified in said act. The said State acquired said lands from the United States by virtue of said act of Congress. In pursuance of said contract with the United States said State entered into a contract with the grantor of said plaintiff whereby it sold him said lands as being lands acquired by it from the United States under said act of Congress, and thereafter, in pursuance of said contract, patented to plaintiff as the assignee of said purchaser said lands as being lands acquired by it by virtue of said act of Congress for the purchase-price of principal and interest of over $1,000 paid to it by said plaintiff and his said grantor. Yet, by said decision said supreme court holds and decides that said lands thus acquired by virtue of said act of Congress must be used by said State for other purposes than those specified in said act of Congress.

In thus holding and deciding said supreme court of said State committed error, for thereby the State is made to impair the
103 obligation of its contract with the United States and also the obligations of its said contract with said plaintiff and his said grantor.

Wherefore said plaintiff in error, John H. McNee, prays that the judgment of said supreme court wherein said decision was made may be reversed.

S. F. LEIB,
Attorney for Pl'ff in Error.
JOHN H. McNEE.

[Endorsed:] 11107. United States Supreme Court. John H. McNee, plaintiff, *vs.* Peter J. Donahue, defendant. Assignment of errors and prayer for reversal.

Endorsed: Filed July 18, 1888. J. D. Spencer, clerk, by Frank Myers, deputy. S. F. Leib, att'y for pl'ff.

Personal service admitted July 18, 1888.
DOYLE, BARBER, GALPIN & SCRIPTURE,
Attorneys for Def't in Error.

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said supreme court before you, between John H. McNee as plaintiff and Peter J. Donahue as defendant, wherein was drawn in question the validity of an authority exercised under the United States, and the decision was against its validity, and wherein was drawn in question the validity of a statute of the State of California and an authority exercised under said State on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States and a clause of a statute of the United States, and the decision was against the title and right specially set up and claimed under such clause of said Constitution and statute, a manifest error hath happened to the great damage of the said plaintiff, John H. McNee, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said United States Supreme Court to be then and there held, that, the record and proceedings aforesaid be- inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this tenth day of July, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

Seal U. S. Circuit Court, Northern Dist.

L. S. B. SAWYER,
Clerk of the Circuit Court of the United States for the Northern District of California.

The above writ of error is hereby allowed.
NILES SEARLS,
Chief Justice Supreme Court State of California.

[Endorsed:] No. 11107. United States Supreme Court. John H. McNee, plaintiff, *vs.* Peter J. Donahue, defendant. Writ of error. Filed July 10, 1888. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

105 *Clerk's Certificate.*

In the Supreme Court of the State of California.

JOHN H. MCNEE, Pl'ff in Error,
v.
PETER J. DONAHUE, Def't in Error.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing one hundred and four pages, numbered from one to one hundred and four, both numbers inclusive, constitute a full, true, and correct transcript of the proceedings in the cause above entitled and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court this 12th day of September, 1888.

Seal Supreme Court of California.

J. D. SPENCER, *Clerk*,
By BEN. M. MADDOX, *Deputy*.

Endorsed on cover: California supreme court. No. 121. John H. McNee, pl'ff in error, *vs.* Peter J. Donahue. Filed September 26, 1888.

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CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 121.

JOHN H. McNEE, PLAINTIFF IN ERROR,

vs.

PETER J. DONAHUE, DEFENDANT IN ERROR.

STATEMENT OF CASE.

S. F. LEIB,
Attorney for Plaintiff.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 121.

JOHN H. McNEE, PLAINTIFF IN ERROR,

vs.

PETER J. DONAHUE, DEFENDANT IN ERROR.

STATEMENT OF CASE.

This is an action of ejectment brought in the superior court of the county of Santa Clara, State of California, to recover $106\frac{84}{100}$ acres of land, and being described as lots 1 and 2 of section 26, town. 6 south, range 1 west, Mount Diablo meridian, according to United States survey.

The plaintiff's title rests upon the following facts:

Plaintiff's Title.

On July 2, 1862, Congress passed a law granting to the several States lands for the special and sole purpose of building and maintaining colleges of agriculture and the mechanic arts. In that act Congress took great pains to absolutely insure that her beneficence for this special purpose should not be misapplied or diverted. The law, by its very terms, provides that the lands (or their proceeds) can be

used by the State for that purpose alone. The State was made the instrumentality—the mere trustee, to receive these lands, convert them into money and build and maintain these colleges therewith.

The law contains these provisions:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:*

"SECTION 1. That there be granted to the several States, *for the purposes hereinafter mentioned*, an amount of public land, to be apportioned to each State, a quantity equal to thirty thousand acres for each Senator and Representative in Congress, to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty: *Provided*, That no mineral lands shall be selected or purchased under the provisions of this act.

* * * * * *

"SEC. 3. *And be it further enacted*, That all the expenses of management, superintendence, and taxes from date of selection of said lands previous to their sales and all expenses incurred in the management and disbursement of the moneys which may be received therefrom shall be paid by the States to which they may belong out of the treasury of said States, *so that the entire proceeds of the sale of said lands shall be applied without any diminution whatever to the purposes hereinafter mentioned.*

"SEC. 4. *And be it further enacted*, That *all* moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned and from the sales of land scrip hereinafter provided for shall be invested in stocks of the United States or of the States or some other safe stocks yielding not less than five per centum upon the par value of said stocks, and that the moneys so invested shall constitute a *perpetual* fund, the capital of which *shall remain forever undiminished* (except so far as may be provided in section fifth of this act), and the interest of which shall be *inviolably appropriated* by each State *which may take and claim the benefit of this act* to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning

as are related to agriculture and the mechanic arts in such manner as the legislatures of the States may respectively prescribe in order to promote the liberal and practical education *of the industrial classes* in the several pursuits and professions of life."

Act of July 2, 1862, 12 U. S. Stat. at Large, 503.

Not only was a trust placed upon the State in regard to these lands, but it was required to become a matter of contract. The act provides:

"No State shall be entitled to the benefits of this act *unless* it shall express its *acceptance thereof* by its legislature within two years from the date of its approval by the President."

Act of July 2, 1862, sec. 5, subdiv. 7.

Within the two years and on March 31, 1864, the legislature of California expressed "its acceptance thereof" as follows:

"*Resolved by the senate (the assembly concurring)*, That the State of California *doth hereby accept* the benefits of the act entitled 'An act donating public lands in the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts,' passed July 2, 1862."

Stat. of California, 1863–'4, p. 559.

We therefore not only have a trust established upon the State as to all lands which it might take under this act, but a contract to the same end; not a contract between private individuals merely, nor even a contract between a sovereign and an individual, *but a solemn compact between two sovereigns.* The State was required not only by her duties as a trustee but also in fulfillment of her contract with the United States to sell these lands for the purpose of raising funds with which to carry out the object specified.

This grant has always been a favorite one in the eyes of Congress. For instance, no other grant made by Congress to the State has ever been allowed to be located upon or ex-

hausted out of double minimum lands, sometimes called $2.50 lands—that is, lands in even-numbered sections and within the limits of a railroad grant. The solitary exception was made in this respect in favor of this grant whereby it was provided that double minimum lands might be selected under it by the State paying the extra $1.25 per acre to the United States. The listing was to be made in the usual way, and upon payment of the extra $1.25 per acre the United States was to patent the land to the State.

(See these acts of Congress referred to in the United States patent to the State on page 23 of the Record).

Under these laws the State was enabled to sell the lands in satisfaction of this grant at a price very much in excess of the customary rate of $1.25 per acre. It appears she sold the lands in dispute to William Johnson, the grantor of plaintiff, at $6.25 per acre.

Record, p. 39.

This was on September 10, 1873—some 18 years ago.

Record, p. 15.

The State was then selling and is still selling her lands under the other land grants at $1.25 per acre.

On September 11, 1873, the State applied to the United States for this land as a part of the lands granted to her by the said act of July 2, 1862, and thereafter and on November 3, 1874, the United States approved said selection and listed over said land to the State *as a part of the lands granted under said act.*

Record, pp. 15 and 16.

Afterwards the plaintiff, the grantee of said Johnson, paid to the State the necessary money to pay the United States the excess on account of the lands being double minimum.

Record, p. 39.

Upon receiving such excess the United States issued its patent to the State for such land as a part of the lands granted by the act of July 2, 1862.

Record, pp. 16 and 17.

See patent set out at length.

Record, p. 23.

The State having received this land from the United States under the grant of July 2, 1862, she proceeded, under her duty as a trustee and as a part of her contract with the United States, to sell the same.

She sold it to Wm. Johnson and conveyed it to him, or, rather, to the plaintiff as his assignee, for $6.25 per acre, which was just five times as much as she was ever able to sell any of her lands for, which she received under any other grant.

The State issued her patent accordingly to plaintiff on June 17, 1882.

Record, p. 16.

The patent is set out at length on page 25.

It must be conceded that whatever title was conveyed by the United States patent to the State is now held by the plaintiff.

Defendant's Claim of Title.

The land in dispute was not surveyed until May, 1866, and the first and only plat of survey covering the land in dispute was filed May 19, 1866.

In 1862, while the land was still unsurveyed, the defendant's ancestor filed his application with the State authorities to purchase the land in dispute in lieu of certain other lands therein specified.

Certain other proceedings were had and the act of July 23, 1866, was passed by Congress. As the State supreme

court held these proceedings and this act of Congress vested an absolute title in defendant, it will be necessary to state in some detail what those proceedings were and what laws were then in force. The State laws then in force was the act passed April 23, 1858 (Statutes 1858, p. 248), and the act passed April 22, 1861 (Statutes 1861, p. 220), which last act was amendatory of the first. The act of 1858, sec. 3, provides that the application to purchase should "be accompanied with the affidavits of the person wishing to purchase and two disinterested witnesses," stating certain facts. (Stat. of Cal., 1858, p. 248, sec. 3.) Section 7 of the act of 1861 required that affidavit to state a further fact, to wit:

"Sec. 7. *All* affidavits for the location of lands made before the locating agent shall have the same effect as though made before a notary public or justice of the peace, and said affidavit shall set forth, *in addition* to the requirements of section three of the act to which this act is supplemental and amendatory, that there is no improvement of any description on the land sought to be located except that of the applicant if there be any improvement thereon."

Stat. of Cal., 1861, p. 220, sec. 7.

This fact does not appear in the affidavit of the witnesses made for the purpose of locating these lands.

Record, p. 32.

The statute also provided that the State authorities should only sell lands upon the contract that the State was not responsible for the title, but that if the purchaser's location should be accepted by the United States, that *such* acceptance of *such* location should be for the purchaser's benefit. Hence the statute provided that the only contract the locating agent should make on behalf of the State was one which should in express words state that "if said location be made *and approved by the United States*, it shall be for the use and benefit of such applicant."

Stat. of Cal., 1858, sec. 5, p. 249.

The contract contained no such provision.
Record, p. 33.

The contract substituted the approval of the "*State surveyor general*" for the "*United States*," a very different proposition.

The statute also provided that no lands, whether surveyed or unsurveyed, would be allowed to be selected in lieu of sixteenth or thirty-sixth section, which were not yet lost, but simply *might* be lost in the future.

The applicants for "lieu lands" had not been satisfied in hunting up lands that the official plats of the United States showed to be lost, but were taking the place of the United States in that regard and making the best guess they could as to what lands would *probably* be lost, and were applying for lands in lieu thereof, before the loss had occurred and which might never occur. So the statute provided that the lands must appear by the township plats of the United States to have been lost. The statute provides:

"SEC. 1. As soon as practicable after the passage of this act the locating agent of each land district shall obtain *from the United States registers* of their respective districts a list of the sixteenth and thirty-sixth sections, * * * donated to the State by Congress for school purposes, * * * and also a list of such lands as *have been reserved or are covered by private claims or grants and for which the State is entitled to select other lands in lieu thereof.*

"SEC. 3. In lieu of those sixteenth and thirty-sixth sections * * * covered by private claims or grants, other lands shall be located and sold in the same manner and on the same terms and at the same price as is provided in the act to which this is supplemental and amendatory, except as herein otherwise provided.

"SEC. 4. The application for the location and purchase of the land described in section three of this act *shall set forth the particular sixteenth or thirty-sixth section or part thereof in lieu whereof the location is made.* * * *"

Statute of Cal., 1861, p. 218, secs. 1, 3, and 4.

It will thus be seen that the State intended to put a stop to lands being sold or purchased in lieu of 16th or 36th sections, which were not yet lost and which were not shown in the United States register's office, from the township plat, to *be* lost. No more guessing as to what lands were *going* to be lost was to be indulged in.

Only those lands were to be used, as the basis for selecting other lands, which the official surveys showed to be lost to the State.

Now, in the case in hand the application of Donahue showed he based his claim to purchase the lands in dispute in lieu of a part of section 16, town. 6 S., range 1 E.

Record, pp. 13 and 33.

Said section was not lost to the State until seven years thereafter, when the Milpitas rancho was confirmed.

Record, p. 13.

Nor did the United States register's office show such loss until ten years thereafter, when the township plat was filed, on May 1st, 1872.

Record, p. 39.

Therefore the said land had not been disposed of to Donahue *under the laws of the State* for each of such reasons.

In May, 1866, the township covering the land in dispute was surveyed by the United States, and on May 19, 1866, it was filed in the United States register's office. On May 30, 1866, the State authorities notified the United States register that it selected the land in dispute in lieu of the supposed lost land.

Record, p. 14.

But the supposed lost land had not then been lost; and in addition to that the land attempted to be then selected was then double minimum land, and the same had been expressly reserved as such by the United States from all loca-

tions and from every sort of entry except homestead and pre-emption.

Record, p. 17.

So, for each of the above reasons, the United States could not and did not pay any attention to such attempted selection.

Then came the act of Congress of July 23, 1866.

14 Stat. at Large, p. 218.

That statute provides:

"SEC. 1. That in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and are hereby, confirmed to said State: *Provided*, That no selection made by said State, contrary to existing laws, shall be confirmed by this act for lands to which any adverse pre-emption, homestead, or other right has at the date of the passage of this act been acquired by any settler under the laws of the United States, or to any lands which have been reserved for naval, military, or Indian purposes by the United States, or to any mineral land, or to any land held or claimed under any valid Mexican or Spanish grant, or to any land which at the time of the passage of this act was included within the limits of any city, town, or village, or within the county of San Francisco: *And provided further*, That the State of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law.

"SEC. 2. *And be it further enacted*, That where the selections named in section 1 of this act have been made on lands which have been surveyed by authority of the United States, it shall be the duty of the proper authorities of the State, when the same has not already been done, to notify the register of the United States land office for the district in which the land is located of such selection, which notice shall be regarded as the date of the State selection; and the Commissioner of the General Land Office shall, immediately after

the passage of this act, instruct the several local registers to forward to the General Land Office, after investigation and decision, all such selections, which, if found to be in accordance with section 1 of this act, the Commissioner shall certify to the State in the usual manner."

It will be observed that where the selection is confirmed at all it is confirmed to the *State*, in order that *she* may make good her contracts which she had made with the purchaser and with which the United States had nothing to do. The purchaser takes nothing directly under the act. He must still look to the State for his title; nor is every selection confirmed to the State even. It is only where contracts had been made with purchasers "*under the laws*" of the State that the selection was confirmed. Congress was willing that the State should, if she wished, carry out contracts which were made in accordance with the State laws, even though such contracts were in violation of the Federal laws, but contracts which were not in conformity with either the Federal or the State laws the State was not bound to recognize; and hence there was no reason for Congress to waive the infraction of her own laws in such cases. As Congress was waiving the infraction of her own laws only in specified cases, to wit, where the State laws had been followed, she provided that in each case where the State claimed the land, the United States should investigate and decide *for herself* whether the case was one within the terms of the act.

It will also be observed that there are certain other exceptions in section one, and especially the last proviso, which says:

"*And provided further*, That the State of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law."

Most of these exceptions and questions, and especially the last one, could only be determined by the United States

records and the United States officers; and to their *exclusive* investigation and decision was very properly and of necessity confided the determination as to whether any particular selection was or was not within the terms of the act.

On April 9, 1867, the State surveyor general and register wrote a letter to the United States register enclosing a list of lands which, he stated, he claimed under the act of July 23, 1866, "unless" the lands fell within the exceptions mentioned in section 1 of that act. He did not state whether they did or did not fall within said exceptions; nor did he state that the lands had been disposed of "under the laws" of the State.

The lands in dispute were included in that list.

Record, pp. 37–39.

In 1868 certain lands in section 21, in township 9 south, were selected by the State in the United States land office in lieu of the said supposed lost lands in section 16, township 6 south, range 1 east. The State then had made *two* selections in lieu of the same lost lands. If both selections were to be allowed, then the State would be getting two acres of lieu land for one acre of lost land, which no law of Congress ever allowed, not even the act of July 23, 1866, as shown by the last proviso to section 1 of that act.

The officers of the United States Land Department were confronted with both selections, and had to investigate and determine the validity of each. If the first was valid, the second of necessity was invalid. To determine the second to be valid was necessarily to determine that the first was invalid.

On August 30, 1869, the Land Department determined the first selection was invalid, and that the second one was valid, for she approved the last selection and listed the land under it.

Record, pp. 18, 19.

In 1873, three years after receiving such land, the State sold and patented it to a purchaser.

Record, p. 19.

In 1853 a Mr. Franklin and a Mr. Parr assumed to make what was called a land-warrant location. But as that was the first and last of this claim of title, as the State never claimed any title from the United States on account of it, as it was never called to the attention of the United States by any one, not even by the purchaser (whom the law made the agent of the State for that purpose—Statute of California, 1859, p. 338), as the decision of the lower court in no way rests upon it, we may lay that assumed warrant location out of the case, simply calling attention to the fact that the evidence showed it was doubtful if it was not void on its face from the patent ambiguity that it did not state the base or meridian, so that its location could be determined; that it was on unsurveyed land and void; that it covered a portion of a Mexican grant afterwards confirmed and patented by the United States; that it did not cover all the land in dispute, and that not one of its lines conformed even substantially to any Government subdivision line.

Record, pp. 26–31.

Assuming that no claim can be or will be made on account of this assumed location, it will not be referred to further.

What the Lower Court Decided.

The supreme court of the State and the superior court of Santa Clara county decided on the foregoing facts as follows:

1st. That there was no trust resting upon the State as to lands she received under the act of July 2, 1862.

2d. That the listing and patent of the United States issued to the State of California for lands under that act were abso-

lutely void, and as a consequence the plaintiff acquired no title from the State by his patent.

3d. That the title of the United States to the land in controversy was vested in defendant by the act of July 23, 1866, and for this reason the subsequent listing and patent of the United States to the State for said land were void.

4th. That plaintiff should execute a conveyance of such lands to defendant.

The questions involved are the questions thus decided. They all fairly arise upon the judgment-roll alone, but are also presented upon the evidence set forth in the statement on motion for a new trial which is embraced in the record.

Specifications of Error.

The plaintiff specifies and asserts that said supreme court of California and said superior court of Santa Clara county erred in holding and deciding—,

1st. That there was no trust resting upon the State as to the lands in dispute which she received by listing and under patent of the United States in pursuance to the said act of Congress passed July 2, 1862.

2d. That the listing and patent of the land in dispute by the United States to the State of California for the land in dispute under said act of Congress of July 2, 1862, were void, and as a consequence the plaintiff received no title by his patent from the State.

3d. That the title of the United States to the land in controversy was vested in defendant by the said act of July 23, 1866, and for this reason the subsequent listing and patent of the United States to the State for said land were void.

4th. That plaintiff should execute a conveyance of said land to said defendant.

And because of each of said errors the plaintiff urges and will urge a reversal of the judgment herein.

Argument.

The plaintiff submits that the following points of law are correct:

I.

Whatever title the State took from the United States under the act of Congress of July 2, 1862, she took in trust and by contract to use the same for the objects specified in said act.

The wording of the act shows the trust, and the wording of the act and the acceptance of the act by the State shows the contract.

In a very recent case in this Court it seemed to be the unanimous opinion that the State took the benefits of said act as a trust to carry out the purposes of said act.

Cornell University *vs.* Fiske, 136 U. S., 177.

Quite a parallel case exists in the grant by Congress to the State of the Yosemite valley. In speaking of that grant this Court says:

"By the act of June 30, 1864, c. 184, the United States granted to the State of California the Yosemite valley and the Mariposa Big Tree grove, 'with the stipulation, nevertheless, that the State shall accept this grant upon the express condition that the premises shall be kept for public use, resort, and recreation, and shall be inalienable for all time, * * * the premises to be managed by the governor of the State and eight other commissioners to be appointed by the executive of California, who shall receive no compensation for their services' (13 Stat., 325). In 1866 the State of California, by an act of the legislature, accepted this grant 'upon the conditions, reservations, and stipulations contained in the act of Congress.' There cannot be a doubt that in this way these interesting localities were, by the joint act of the United States and California, devoted to a special public use. The title was transferred to California for the benefit of the public as a place of resort and recreation. Without the consent of Congress the property can

never be put to any other use and the State cannot part with the ownership. It may be called a trust, but only in the sense that all public property held by a public corporation for public uses is a trust. *It must be kept for the use to which it was by the terms of the grant appropriated.* If it shall ever be in any respect diverted from this use the United States may be called on to determine whether proceedings shall be instituted in some appropriate form to enforce the performance of the conditions contained in the act of Congress or to vacate the grant. *So long as the State keeps the property it must abide by the stipulation on the faith of which the transfer of title was made.*"

Ashburner *vs.* California, 103 U. S., 577, '8.

This case was approved in the recent case of Yosemite Stage Co. *vs.* Dunn, 83 Cal., 268, '9.

Even a private trustee who is under trust obligations to another cannot fulfill those trust obligations with lands he receives under still another trust.

Burchard *vs.* Hibbard, 11 Ohio, 316.
Buckingham *vs.* Hanna, 2 Ohio St., 551.
Fretelliere *vs.* Hindes, 57 Texas, 392.
Jackson *vs.* Mills, 13 John., 463.
Kelley *vs.* Jenness, 50 Me., 455.
Rawle on Covenants (4th ed.), 399.

And though there is no express trust, a State receiving lands under one grant from Congress cannot sell and patent them to a purchaser in pursuance of some other grant which she received from Congress.

"That patent was for swamp land, and it is undisputed that all the land in question here formed part of the 500,000-acre grant. *The patent, therefore, conveyed nothing.*"

Langenour *vs.* Shanklin, 57 Cal., 75, '6.

II.

The record title of plaintiff claiming under the grant in the act of July 2, 1862, is perfect.

There was an application from the State to the United States for this land under that grant, a listing and patent from the United States under that grant, and a patent from the State to plaintiff as land obtained under that grant.

III.

All presumptions are in favor of the validity of the United States patent to the State in conveying this land as agricultural grant land.

It would be a waste of time to cite and quote authorities to establish this proposition when that proposition is so well established by so many authorities.

If it is necessary to presume that the officers of the Land Department determined they had a right to issue this patent because they had examined the previous State selection and found it not to be one of the cases provided for by the act of July 23, 1866, it will be presumed, in support of the validity of the patent, that they had made such examination and decision.

Whatever presumption can be indulged in *consistent with the record* will be indulged in to support the solemn act of the Government in issuing the patent in question. To quote from a recent case in this Court, where it was speaking of the validity of patent issued by the Land Department, " the doctrine as to the regularity and validity of its department acts where it has jurisdiction goes so far that if *in any circumstances under existing law* a patent would be held valid it will be *presumed* that such circumstances existed."

Smelting Co. *vs.* Kemp, 104 U. S., 646.

This language is quoted with approval in a very recent case by the present supreme court of California.

Gale *vs.* Best, 78 Cal., 240.

It is therefore to be presumed in favor of the validity of

this patent that such investigation and decision as to the previous State selection was made, and was made to the effect that such selection was not within the act of July 23, 1866, and especially is this true in view of the provisions of section 2 of that act, which made it the *duty* of the Land Department to make such investigation and determination.

IV.

The title of the United States did not pass to the State under the assumed State selection.

1.

When that assumed selection was made this land *was double minimum land and not subject to such selection.*

The order withdrawing the land by the Land Department says:

"The even-numbered sections within said limits will be subject to homestead and pre-emption, *but not subject to private entry or location.*"

Record, p. 17.

Weaver *vs.* Fairchild, 50 Cal., 360.

2.

When that assumed selection was made *the land in lieu whereof such assumed selection was made had not been lost to the State.*

Record, p. 13.

And therefore selections for lands in lieu of them were void.

Rosecrans *vs.* Douglas, 52 Cal., 213.

3.

Besides this, *before such selection was accepted by the United*

States, the State selected other lands in lieu of these lost lands, which selection was accepted by the United States, and the last-selected lands were listed to the State accordingly. *This exhausted the right of the State for lands in lieu of such lost lands.*

Record, pp. 18–19.

V.

No title vested in the State by the act of Congress of July 23, 1866.

1.

In the United States Land Department rested the exclusive jurisdiction to investigate and determine whether the State selection was or was not within the confirmatory provisions of section one of that act.

Act of July 23, 1866, sec. 2.

The meaning of this act cannot probably be better expressed than in the language of the supreme court of California shortly after the act was passed, the same having been passed in response to a petition of the legislature of the State of California, and while all the facts leading to the passage of the law were fresh in the minds of the members of the court.

The court says:

"The act does not confirm to the State *all* the lands which may have been selected by her, but only such as has been selected and sold to purchasers in good faith *under her laws;* and such selections, even, are not confirmed if, at the date of the passage of the act (23 July, 1866), there had been attached to the land any pre-emption, homestead, or other right in favor of any settler under the laws of the United States, or if the land was within any naval, military, or Indian reservation, or mineral, or claimed under a Mexican or Spanish title, or within the limits of any city, town, or village or the county of San Francisco, *or in excess of the quantity of land to which the State is entitled for improvement*

and school purposes under existing laws. It does not confirm to the State *any specific land* or finally validate *any particular selection, for it reserves to the General Government* the right to inquire as to each selection and determine whether it has been made and the land sold to purchasers in good faith *under the laws of the State,* and whether the land *falls within any of the exceptions stated in the first section.* The effect of the act upon State selections is, in the main, similar to the effect of the congressional donations upon the land. For example, under the eighth section of the act of September, 1841, donating five hundred thousand acres for internal improvements the State, upon her admission into the Union, *became vested with the title to so much of the public domain within her limits, but she became vested with the title to no specific land.* That could not happen until after a survey and a selection approved by the General Government. So this act confirming selections made by her, contrary to the laws of the United States, *does not vest in her the title to any specific selections. This cannot happen until after the selection has come before the proper officers of the General Grvernment, and, after examination, has been declared by them of the character described in section* 1—that is to say, not within *any* of the exceptions there stated, and that the land has been sold to purchasers in good faith *under the laws of the State;* by which latter description, we understand, is meant such selections as have been made according to the conditions of the State laws under which they purport to have been made, and have been sold to purchasers in such manner as would have passed the State's title at the time the selection was made if the State had then had a title."

Toland *vs.* Mandell, 38 Cal., 41.

To which, it may be added, that by the last provision to section 1 no selection is to be confirmed which would have the effect of giving the State *more* land than she is entitled to by law.

Who can pass upon or determine that question *except* the United States Land Department? Who is to keep account of the amount exhausted out of the different land grants? And who is to draw the line and call a halt and say no more selections were confirmed by the act, when enough

selections have been presented, adjudged valid, and the lands listed over to exhaust the grant from Congress to the State?

Besides, in this particular case the selection is for land in lieu of other lands claimed to have been lost. Who is to investigate whether those lands are lost or not? For the court will bear in mind that the State is to get no more land than she is entitled to by law, and hence could not receive this land unless the other lands *were* lost. This court in a case involving questions entirely similar to all those above mentioned in the Toland case, and especially the case in hand, as this was for indemnity lands, makes use of the following language:

"But as to the remainder of the lands taxed which fell within the indemnity limits the case is different. For such lands *no title could pass* to the company, not only *until* the selections were made by the agents of the State appointed by the governor, but *until such selections were approved by the Secretary of the Interior*. The agent of the State made the selections, and they have been properly authenticated and forwarded to the Secretary of the Interior; but that officer never approved of them, nor can such approval be inferred from his not formally rejecting them. He refused, as already stated, to issue to the company any patents for any more lands, insisting that it had already received over 40,000 acres too much, and he directed the Commissioner of the General Land Office to require the company to restore this excess to the Government. The approval of the Secretary was essential to the efficacy of the selections and to give to the company any title to the lands selected. His action in that matter was not ministerial, *but judicial*. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the Government or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There

could be no indemnity *unless a loss was established;* and in determining whether a particular selection could be taken as indemnity for the losses sustained he was obliged to inquire into the condition of those indemnity lands and determine whether or not any portion of them had been appropriated for any other purpose, and, if so, what portion had been thus appropriated and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, *but for the protection of the United States against an improper appropriation of their lands.* Until the selections *were approved* there were no selections in fact, only preliminary proceeding taken for that purpose, *and the indemnity lands remained unaffected in their title.* Until then the lands which might be taken as indemnity were incapable of identification. The proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned; but such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts."

Wisconsin R. R. Co. *vs.* Price Co., 133 U. S., 511–'12.

Doubtless the grant was in one sense a grant *in presenti.* Doubtless *when* the selection was approved and the land listed over, the title of the State would relate back to the date of selection; and that is probably the reason that in the second section of the act of July 23, 1866, occur the words "which notice shall be regarded as the date of the State selection." That, however, does not do away with the necessity of the selection being approved before the title passes, either by the doctrine of relation or otherwise.

The supreme court of California has consistently held this view until the determination of the case at bar. In a case arising under the second section it says:

"In construing these sections we have several times decided that *the title does not pass to the State until the land has been certified over to it by the Commissioner of the General Land Office.* (Hodapp *vs.* Sharp, 40 Cal., 69; Collins *vs.* Bartlett,

44 *id.*, 371.) There is no proof in this record that the land in controversy has ever been certified over to the State by the commissioner, and there is some evidence to the contrary. There is, therefore, nothing to show that the State has ever acquired a title, founded on its selection in 1863 or otherwise. The plaintiff has such privity with the paramount source of title as enables him to attach the defendant's patent; and whatever presumptions might otherwise arise to support the patent, they can have no force in the face of the fact that it is founded on a selection originally void, and there is no proof that it has been validated by the curative act of 1866 so as to pass the title."

Chant *vs.* Reynolds, 49 Cal., 217.

See also Hodapp *vs.* Sharp, 40 Cal., 69.
Buhn *vs.* Chisim, 48 Cal., 471–2.

These results are very properly arrived at, not by reading the words "shall be and hereby are confirmed to the State," entirely disconnected from and ignoring all the rest of the statute, but by reading all the statute together and giving effect to all its provisions.

The case of Wright *vs.* Rosenberry, 121 U. S., 500, cited in the opinion of the lower court, and which involved the construction of a portion of this act, was concerning swamp land and was not embraced within the provisions of sections 1, 2, and 3 of this act. It was *because* it was *not* within the provisions of the first three sections of the act that this court held that it was not necessary to obtain the decision of the United States Land Department, as provided in section 2.

Wright *vs.* Rosenbery, 121 U. S., 512.

As said in the above-quoted opinion in Toland *vs.* Mandel, the act "does not confirm to the State *any specific land* or finally validate *any particular selection*," and therefore the quoting by the lower court from the opinion of this court in Whitney *vs.* Morrow, 112 U. S., 695, is inapt to the present case. That quotation commences with the words: "If, by a legislative declaration, a *specific tract* is confirmed to any

one." In the present case some one had to determine *what* lands were confirmed by the act.

The learned Commissioner, writing the opinion for the lower court, also seemed to think a distinction existed in section 2 between the case of where a notice of a selection had already been given by the State and where it was yet to be given, and that in the former case no examination of whether the land was one to which the confirmation applied could be made by the Land Department, and in the latter case such examination had to be made; but it is respectfully submitted that the reading of such section does not admit of any such construction; and it is impossible to conceive why an examination as to such matters should be made in one case and not in the other. It will hardly be contended that if the notice of selection preceded the act by a few days the selection should for that reason override all the exceptions and provisions of section 1. If it did not *who* is to make the examination and see that it does not contravene those exceptions and provisions? *Who* is to determine whether, by approving any particular selection, the State would or would not be getting *more* land than she was entitled to by law, which the provision to section 1 says she shall *not* do?

2.

The Land Department has investigated this assumed selection and determined it was not within the terms of confirmation of section 1.

The proposition last advanced was that until the Land Department had acted on this selection, and acted favorably, the plaintiff's patent must govern. But the present proposition goes still further. The department *has* acted on that selection and has determined it *not* to be valid. It has done this *of necessity* on two occasions.

First. In 1868 the State applied to the United States for still other lands in lieu of these lost lands.

Record, 18, 19.

Here, then, were two distinct selections by the State for distinct lands in lieu of the same and identical lost lands. Both selections could not be allowed by the department. It is evident at once that the validity of each selection was a question which of necessity must be determined. If the first selection was valid, it was the one to be allowed; unless it be held the State could waive that selection, even though valid, a view equally fatal to defendant's claim.

If the State could not waive the first selection, then its validity was of necessity to be determined. If determined as valid the second selection could not be allowed. But the second selection *was* allowed and the land under it listed over to the State. Therefore it necessarily follows that the department determined the first selection was invalid.

"Indeed the doctrine as to the regularity and validity of its department acts, where it has jurisdiction, goes so far that if *in any circumstances under existing law* a patent would be held valid it will be *presumed* that such circumstances existed."

Smelting Co. *vs.* Kemp, 104 U. S., 646.
Gale *vs.* Bent, 78 Cal., 240.

Here we are not required to simply *presume* an investigation and adverse decision as to the facts upon which the validity of this selection must rest.

The facts of the case show that of necessity it must have occurred.

Second. When the State selected the land in dispute in part satisfaction of the grant under the act of July 2, 1862, the same question must of necessity have been again presented for investigation and decision, assuming that the prior investigation and decision had not finally disposed of it.

Both selections could not be allowed, and all that has just been said can be considered repeated here.

3.

But even if the court could substitute its investigation and decision for that of the Land Department, it is equally clear that this selection was not confirmed.

First. The proviso to section 1 reads:

"*And provided further*, That the State of California shall not receive under this act a greater quantity of land for school or improvement purposes *than she is entitled to by law.*"

Under the act of Congress under which this selection was made, every 16th and 36th section was granted to the State for school purposes; and where, on survey, it was found that the United States did not own any particular 16th or 36th section, other lands were to be selected by the State in lieu thereof.

10 Stat. at Large, p. 247, sec. 7.

The meaning of the above proviso to section 1 must be that before any confirmation is had it must be a case where it could be said that the State would *not* receive more land than she was entitled to under existing laws; but this particular 16th section had not been surveyed at the passage of the act of July 23, 1866, nor was it surveyed for several years thereafter.

The Mexican grant which was claimed to embrace it was not then surveyed, nor even yet finally confirmed, and might never be; or, if confirmed, might be so surveyed as not to include this 16th section. In that case the State would get it under the act of Congress granting it to her; and if, in the meantime, the State had received other land in lieu of it, under the act of July 23, 1866, she would be getting more land than she was "entitled to by law." We must not read the act of July 23, 1866, in the light of subsequent events,

by which the State lost this 16th section, but in accordance with the facts as they existed at its passage.

Who could have said at the passage of this act or at the date of the notice of selection that the State had lost said section 16, or that if land was given her in lieu of such section she would not be getting more land than she was "entitled to by law"?

Second. Only such selections were confirmed as had been disposed of by the State to purchasers "*under her laws.*" The reason of this is obvious. The United States did not propose to waive the infraction of her own laws in favor of the State except where the State had involved herself with contracts which were valid so far as their validity depended on the State laws, nor could the United States, even if she would, force a purchaser upon the State who had not complied with her laws. In this case she did not try, for nothing is confirmed to the *purchaser.*

There are three reasons why the alleged purchaser did not comply with the laws of the State, all of which are fully set forth in the statement in this brief, and will be briefly restated here. The State laws are already set out in such statement, so far as they bear upon the matter.

1st. The State law required the affidavit of two witnesses to state that there "is no improvement of any description on the land sought to be located except that of the applicant, if there be any improvement thereon."

Stat. of Cal., 1858, p. 248, sec. 3.
Stat. of Cal., 1861, p. 220, sec. 7.

The affidavit of the witnesses wholly omitted such statement.

Record, p. 32.

2nd. The State law provided that no contract of sale should be made with a purchaser that did not state that "if

said location be made *and approved by the United States* it shall be for the use and benefit of such applicant."

Stat. of Cal., 1858, p. 249, sec. 5.

The contract contained no such provision.

3d. The State law provided that lands could only be selected in lieu of lands lost to the State and shown to be lost by the plats in the United States register's office.

Stat. of Cal., 1861, p. 218, secs. 1, 3, and 4.

The land in lieu whereof this location was made was not lost to the State, nor did the register's office show it to be lost.

Record, pp. 13 and 39.

These are not trivial failures to comply with the law, but most material.

The State herself has often rejected purchasers for far smaller defects.

Hildebrandt *vs.* Stewart, 41 Cal., 392–'3.
Finney *vs.* Berger, 50 Cal., 248.
Vance *vs.* Evans, 52 Cal., 94.
Bottsford *vs.* Howell, 52 Cal., 158.

These are but a very few of the very many cases that can be readily cited in support of the above proposition.

VI.

The court erred in directing plaintiff to convey the land to defendant.

Plaintiff and his grantor paid to the State for what they *believed* to be a good title, the sum of $667.75.

Record, p. 39.

This was over eighteen years ago.

Record, p. 15.

Thus the principal sum, with current interest, would amount to fully $2,000. The plaintiff and his grantor were under no contract or other trust relation with defendant, but stood at arm's-length to him, and were entitled to buy the land if the United States still owned it. In any event, being under no trust relation with the defendant, plaintiff's title, whatever it is, cannot be taken away from him without compensation or due process of law.

The plaintiff respectfully submits that the judgment should be reversed.

S. F. Leib,
Attorney for Plaintiff.

Supreme Court U. S.
FILED.
DEC 8 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 121.

JOHN H. McNEE, PLAINTIFF IN ERROR,

vs.

PETER J. DONAHUE, DEFENDANT IN ERROR.

PLAINTIFF'S BRIEF IN REPLY.

S. F. LEIB,
Attorney for Plaintiff.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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PLAINTIFF'S BRIEF IN REPLY.

The defendant's points are somewhat elusive, but we will try to follow them in their order.

In stating each proposition of defendant, the page of his brief referred to will be placed opposite.

Defendant's proposition, p. 3:

That if this case fell within any of the exceptions of section 1 of the act of July 23, 1866, we should have proved it, and cites the case of Whitney *vs.* Morrow, 112 U. S., 695.

Plaintiff's reply:

The case cited was where there had been a confirmation of a *specific* tract. There has been no confirmation of any *specific* land here. This point was fully discussed in plaintiff's opening brief, and particularly on pages 18 to 20.

Besides, it was only to lands that had been sold by the State "under her laws" that were confirmed in any case.

This point has nothing to do with "exceptions," but is a necessary ingredient, a fact necessary to be inquired into and found to exist, before the confirmation can be said to apply at all. As to *who* must inquire into and determine this fact, and as to whether such inquiry and determination have not already been made, are questions that were fully discussed in our opening brief, on pages 18 to 24.

Defendant's proposition, p. 3:

That at the passage of act of 1866 defendant was a purchaser "under the laws" of the State. The different acts which he claims establishes this proposition of law are set out on page 4 *et seq.* of his brief.

Plaintiff's reply:

The contrary, we think, is fully demonstrated in plaintiff's opening brief, on pages 5 to 12 and 25 to 27.

The worthlessness of the assumed land-warrant location is set out particularly on page 12. As this assumed location was never made to conform to the Government lines, and as it was never presented to the United States, it is not deemed necessary to take the time of the court further concerning it. We will only add to what was there said, that the act evidently contemplates that the location shall, as nearly as possible, be made in accordance with what *will be* the Government survey. Here there is a *purposed* variation from it. For an example of this variation, which is probably the most exaggerated of any ever made in California, the court's attention is directed to the plat thereof on page 30 of the record.

Indeed, this is the only case of a *purposed* variation from the Government survey that has ever been called to the attention of the writer. The idea can hardly be indulged in that as soon as the Government survey was made the location should be made to conform to it (sec. 5), and yet these lines be allowed to be *intentionally* ignored up to that time.

The superior court was of the opinion that the sale to Donahue was "under the laws" of the State, and so stated.

Record, p. 13.

But this was but a conclusion of law.

People *vs.* Jackson, 24 Cal., 632.

The *facts* found by the same court, as well as the facts set out in record as proven at the trial, show that the court erred in that regard; and although this erroneous deduction of law made by the superior court was argued and pressed in the State supreme court as fully as it has been in this Court, yet neither the opposing counsel nor the State supreme court have discussed it in the least.

It is respectfully submitted that the point cannot be successfully answered.

Defendant's proposition, p. 7:

That the defects in the location of the land warrants and lien lands were cured by the act of California in 1872.

Plaintiff's reply:

But that act has no reference whatever to land-warrant locations. As to the lieu-land location it did not apply, for it only pretends to deal with cases where the State, at the passage of that act, had title to the lands.

C. F. L. Co. *vs.* Moir, 83 Cal., 106.

The State had no title at that time.

But a most complete answer is that the statute of July 23, 1866, required the disposition of the lands confirmed to have been already made *at that date* "under her laws."

It is respectfully submitted that the State could not bring herself within the terms of that act by *thereafter* waiving defects which *then* existed.

At the passage of the act of July 23, 1866, either the State

had disposed of those lands "under her laws" or she had not. If she had *not*, that ended the matter.

Defendant's proposition, p. 7:

That Donahue's "application" to purchase lieu land complied with the law.

Plaintiff's reply:

No one ever doubted it. It was the affidavits of the witnesses, the contract not containing an essential provision expressly required by law, and the fact that the assumed "lost" lands had not been "lost" that constituted the violations of the State laws.

Defendant's proposition, p. 8:

That defendant's certificate of purchase was *prima facie* evidence of title.

Plaintiff's reply:

This is only true as against those holding no title. But as against the holder of a United States patent no such presumption could exist.

Even were it otherwise, the "*prima facie*" presumption is overthrown by the facts found and proven.

Defendant's proposition, p. 8:

That the act of the legislature provided for the selection of *unsurveyed* lands as lieu lands.

Plaintiff's reply:

No one disputed it. But the point is that the lands, *in lieu of which the selection was made*, must be "*lost*" before other lands, surveyed or unsurveyed, could be selected in lieu of them.

Defendant's proposition, p. 9:

That under the decision of Wright *vs.* Rosenberry, 121 U. S., 512, the State had a perfect title without examination, decision, or listing.

Plaintiff's reply:

This was the view of the State supreme court, and it was solely on the misconstruction of that decision that the former decisions of the supreme court of California were not followed in the case at bar. The Wright case was a very plain case and ought not to have been misunderstood. *It only referred to cases where the records of the United States showed the State was entitled to the land.* A Government township plat which has "swamp and overflowed" written upon it is just as plain and definite as a patent could be itself. A patent could add nothing to it unless it was convenience in being able to carry it around by the purchaser, which he would not be able to do with the official township plat.

The issuing of the patent in such a case would necessarily be purely ministerial and in no way the result of investigation and decision.

Wright *vs.* Rosenberry, 121 U. S., 488.
Tubbs *vs.* Wilhot, 138 U. S., 146.

In the last case cited, this Court, speaking through the same learned Justice who wrote the opinion in the Wright case, says:

"Whether the township plat be considered as approved by the action of the surveyor general or by the subsequent recognition of its correctness by the Commissioner of the General Land Office, when approved, the duty of the Commissioner to certify over to the State the lands *represented thereon* as swamp and overflowed was purely *ministerial*."

How can it be contended that the duties required by section 2 of the act of July 23, 1866, of investigating and de-

ciding the facts referred to in section 1 are "purely ministerial"?

In fact, this Court, in the Wright case, takes occasion to expressly state of section 1:

"*This section does not, as supposed by counsel, apply to the swamp and overflowed lands.*"

Wright *vs.* Rosenberry, 121 U.S., 512.

For what purpose did the Court draw this distinction, if there is no distinction?

The reasons for investigation and decision as to whether lands had been sold "under the laws" of the State or were in excess of the amount of some particular grant could not apply to swamp land. Congress had granted *all* swamp lands to the State, and whether the State had or had not sold them under her laws could make no difference to Congress. The difference between that case and the cases arising under section 1 does certainly seem too clear for argument or misunderstanding.

Even under the fourth section of the act of July 23, 1866, which did apply to swamp lands, and where the land had *not* been marked "swamp and overflowed," the court held there must be an "examination and decision," and that when made by the Land Department such decision was binding and conclusive upon the courts of the country.

Heath *vs.* Wallace, 138 U. S., 585.

Defendant's proposition, p. 10:

That the act of March 27, 1872, of California cured the defects of defendant's alleged purchase.

Plaintiff's reply:

This has already been disposed of under a similar heading.

Defendant's proposition, p. 10:

The Wright case is again referred to.

Plaintiff's reply:

This has already been disposed of.

Defendant's proposition, pp. 10 and 11:

That the State, by her alleged sales to defendant, had become bound "in trust" to get the title for defendant.

Plaintiff's reply:

We are not certain what defendant means by "bound in trust." We presume that he means the State had made a contract with defendant to get the title for him. None of the laws of California provide for any such contracts. They all provide that it is only when the United States has accepted the *purchaser's* selection that the State will give a title to him. Besides, there can be no contract where the laws are not followed; in addition to which the State never could make or authorize the making of a contract that she would convey a title to a purchaser in violation of her trust and contract with the United States.

All of these propositions in reply are fully shown in the plaintiff's opening brief.

Defendant's proposition, p. 11:

That the listing under the act of 1862, and which recites that it was a listing of lands under and in pursuance of the act of 1862, must nevertheless be considered as having been made under the act of July, 23, 1866.

Plaintiff's reply:

No reason or authority is given for this extraordinary proposition. Besides, it would be in direct violation of the trust and contract between the United States and the State as to lands listed under the act of 1862.

Defendant's proposition, p. 11:

That plaintiff takes the legal title under the same trust that the State held it.

Plaintiff's reply:

The answer to the proposition before the last is an answer to this.

It is extremely difficult to follow defendant. One moment neither the State nor plaintiff took any title and the next they did take it, but took it in trust for defendant.

In the latter case it is proposed to take it away from plaintiff without even reimbursing him what he paid the State for it, part of which went to the United States on account of its being double minimum land.

Defendant's proposition, p. 11:

That listing to a State of school lands conveys the title as fully as a patent could do.

Plaintiff's reply:

No one disputes this, except as to double minimum land, where a patent must issue; and no school grant can be exhausted out of double minimum land except the grant of 1862.

Defendant's proposition, p. 13:

That the court below did not decide anything about the application of the funds the State received from plaintiff for these lands.

Plaintiff's reply:

No one claimed it did. What we do claim is that the State took these lands under the trust and contract created by the act of July 2, 1862, and that in pursuance of that trust and contract she sought and found a

purchaser, and in further pursuance of that trust and contract she purported to convey to him a good title to the land. The plaintiff has a right to claim that title in pursuance of that trust and contract, and not have it taken away from him in violation thereof.

Even if the trust funds were in question, this court would, in any case where the opportunity occurred, have jurisdiction to enforce or declare the trust.

Cornell University *vs.* Fiske, 136 U. S., 177.

This is a much stronger case. We claim directly under a patent of the Government which the lower court refuses to recognize as valid. In addition to that, it proposes, in violation of the trust and contract of the State and the United States under which plaintiff claims, to compel plaintiff to convey that title to defendant.

Defendant's proposition, p. 14:

That this land was not double minimum land until the act of March 6, 1868.

Plaintiff's reply:

This land, as we showed in our opening brief (p. 17), was withdrawn as double minimum land in 1865 by the Commissioner of the General Land Office, and this very withdrawal has been sustained as valid by the supreme court of California.

Weaver *vs.* Fairchild, 50 Cal., 360.

That the Land Department had power to make the withdrawal of these lands as double minimum cannot be doubted. The act of Congress of March 6, 1868, cited by counsel, did not withdraw the land as double minimum, but *restored* it *from* the withdrawal, thereby recognizing the validity of the withdrawal. The title of the act reads, "An act *restoring* lands to market," &c.

The body of the act reads, "The Secretary of the Interior be, and is hereby, authorized and directed to *restore* to homestead settlement * * * all the *even* numbered sections of land," &c.

Defendant's propositon, p. 14:

That defendant is in possession.

Plaintiff's reply:

This is generally the case in actions of ejectment.

Defendant's proposition, p. 14:

That because of defendant's possession plaintiff has no equities.

Plaintiff's reply:

Why not? If this was Government land, why should not plaintiff be allowed to buy it? He stood at arm's length to defendant, and the records of the United States showed the Government owned this land, and the plaintiff was entitled to buy it if he could. He certainly paid a large Government price for it—five times the usual price—a great deal more than what defendant paid.

It is true defendant was in possession, but he knew he had no patent for the land, and if he did not want others to acquire the title from the Government, where he knew the title was, he should have acquired it himself. It is possibly true that during these many years he may have intended to do so; but, as said by our present State supreme court:

"The facts that a settler has occupied and improved the land are merely evidentiary matters. Good intentions alone, added to settlement and improvements, will not establish the ultimate fact. A party who has entered upon public lands to acquire the title from the Government must show

his good faith *by diligently* complying with the requirements of the law under which he expects to acquire title.

Mott *vs.* Hawthorne, 17 Cal., 58.

Western Pac. R. R. *vs.* Tevis, 41 Cal., 494."

McLaughlin *vs.* Menotti, 89 Cal., 365.

The Mott case was decided by Mr. Justice Field while on the supreme court of California, and referred to acquiring title to State lands.

But, while defendant is talking about equities, what about the equities of the grantee of the State for lands selected by the State in 1868 for lands in lieu of the same lands in lieu of which defendant made his selection?

The findings say:

"On November 2, 1868, lots 1, 2, 3, and 4 and the N. W. ¼ of S. E. ¼ and S. E. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼ of sec. 21, T. 9 S., R. 4 W., M. D. M., containing 213.66 acres of land, in California, was selected by the State of California in the United States land office for the San Francisco land district wherein said lands lie, as indemnity for the N. W. ¼ and N. W. ¼ of S. W. ¼ of section 16, T. 6 S., R. 1 E., M. D. M., and such selection was approved by the United States and certified over by the United States to the State of California in clear list No. 10, San Francisco series, on the 30th day of August, A. D. 1869.

"The said State sold said lands and conveyed the same to a purchaser thereof by patent issued on January 7, 1873."

Record, pp. 18, 19.

The lands here named as lost are the same lands named by Donahue as lost. If defendant's title is good, this purchaser's title is bad. Who this purchaser is we have no knowledge; but, while defendant will not recognize that *plaintiff* has any equities, it is possible that he will recognize that there are others, even outside the parties to this case, who *have* equities of the strongest kind. Under such cir-

cumstances is not defendant estopped from claiming title which he ought to have perfected of record?

It has been called to the Court's attention in our opening brief (pp. 21, 2) that the State supreme court had consistently (until this case) held that no title passed under the act of July 23, 1866, until listing.

The Court can well imagine the number of titles that depend on those decisions.

Our supreme court only departed from them in this case by a misunderstanding of the case of Wright *vs.* Rosenberry. Surely the learned Justice writing the decision in that case did not intend, nor did the court pronouncing it intend to disturb or render doubtful the titles of California that rested on long-established decisions of the State court.

One thing more and we have done:

Throughout the opening brief it was assumed that locations or selections upon unsurveyed lands in California were absolutely void.

That such is the law is so self-evident that it did not occur to the writer to cite any authorities. Probably that proposition has been decided or assumed to be true as many as fifty times in California.

We now cite the first and last cases.

Terry *vs.* Megerlie, 24 Cal., 609.
McLaughlin *vs.* Menotti, 89 Cal., 361.

We respectfully submit, the judgment should be reversed.

S. F. Leib,
Attorney for Plaintiff.

Since the foregoing was printed, but before it was filed, there has occurred to the writer what seems to him another conclusive answer to defendant's whole contention.

The State selection could not have been approved by the United States for this reason, if no other, viz:

Defendant only offered to the State, and the State only offered to the United States, to take the 225 acres particularly described in lieu of the 240 acres also particularly descibed.

Now, 120 acres of the 225 acres thus claimed by the State from the United States in each of its notices of selection were a part of an odd section (section 35) and belonged to the railroad at those dates, and for that reason were not and could not be confirmed to the State by the act of July 23, 1866.

Record, pp. 37, 38, 39.
McLaughlin *vs.* Menotti, 89 Cal., 362–'3.

The selection, as such, could not therefore be approved under that act. There is no provision in the act for the approval of a selection in part. Even if there was, the State has never segregated her selection and named some specific 106 acres of lost lands in lieu of which she would accept these 106 acres; and no specific 106 acres or any other specific tract of *lost* land *can be pointed out to support defendant's supposed title to the* 106 *acres in dispute.*

So far as the State has ever insisted on the selection at all she has insisted on it *as a whole;* and as a whole it could not be given to her, because the greater part of it belonged to the railroad.

For the same reason, even were there no other, the alleged warrant location on the 320-acre tract must fail.

The 500,000-acre grant, under which these warrants issued, is required by both the State and Federal laws to be selected in tracts of not less than 320 acres each.

The State provides against loss in either case to the purchaser. The warrant can be floated on other lands (Statutes

of Cal., 1852, p. 41, sec. 7), and the lieu land location can either be floated (Stat. of Cal., 1859, p. 33, sec. 5) or the State will give a certificate for the amount, which can be used as cash in selecting other lands (Stat. of Cal., 1863, p. 597, sec. 19) or give the purchaser the money itself, if he prefers it (Stat. of Cal., 1870, p. 877, sec. 8).

Most respectfully submitted.

S. F. LEIB,
Attorney for Plaintiff.

No. [illegible]

In the Supreme Court of the [illegible]

OCTOBER Term, [illegible]

JOHN H. McNEE,
Plaintiff in Error,

vs.

PETER J. DONAHUE,
Defendant in Error.

Brief on Behalf of the Defendant in Error.

PHILIP C. GALPIN,
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Attorneys for Defendant in Error.

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1891.

IN THE

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JOHN H. McNEE,
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vs.

PETER J. DONAHUE,
Defendant in Error.

Brief on Behalf of the Defendant in Error.

This action was begun by the plaintiff in error, John H. McNee, to recover possession of the lands in controversy, claiming in his complaint the legal title to the same. In defense of this action of ejectment, the defendant in error, Peter Donahue, filed an answer denying the material allegations of the complaint; and in order to avail himself of his equitable rights and compel a transfer of the legal title from the plaintiff to himself, he put in a cross-complaint in the nature of a bill in equity, setting forth a state of facts showing himself entitled to the relief sought. (Transcript, folios 6 to 19 inclusive.)

This method of barring the ejectment and seeking a determination of the rights of the defendant is one recognized under the system here prevailing.

Estrada *v.* Murphy, 19 Cal., 272.
Gibson *v.* Chouteau, 13 Wal., 103.

To this cross complaint plaintiff interposed an answer and the case went to trial, resulting in a judgment for the defendant in the lower court, which judgment was, on appeal, affirmed by the Supreme Court of the State of California.

To justify his writ of error to this Court, the plaintiff makes four assignments of errors. These we will attack and dispose of in their order.

I.

He insists that the Court erred in deciding that the listing by the United States to the State, of the land in controversy in November, 1874, and the patent of the United States to the State, of date June 1st, 1882, under the Act of Congress, approved July 2, 1862, conveyed no title to said lands.

It is under this listing and this patent that the plaintiff in error claims to derive title. The basis of the decision against him in the Supreme Court was, that the title had already passed to the State under the Act of July 23, 1866, entitled "An Act to Quiet Land Titles in California," and the patent had therefore nothing to operate upon. By a mistake of the printer on p. 45, of the Transcript, the "Act of 1836" is

printed while "1856" was intended, and on page 47, "Act of 1886," is printed, while the Act of 1866 was intended.

As no title to the lands remained in the Government at date of patent, no title passed by it.

Patterson *v.* Tatum, 4 Sawy., 172.
Polk *v.* Wendall, 9 Cranch., 82.

The purpose of the passage of the Act of July 23, 1866, was, as is recited in it, to cover cases were the State had made selections of portions of the public domain in part satisfaction of other grants to her, and had disposed of the same to purchasers in good faith under her laws. The exceptions following in the Act (U. S. Stat. at Large, Vol. 14, p. 218) do not apply to this case.

If such exception existed it should have been established by the plaintiff. "If the land was thus occupied the confirmation did not apply, and it remained public property. That which was essential to plaintiff's recovery was not therefore established, nor was any evidence offered for that purpose.

Whitney *v.* Morrow, 112 U. S., 695.

The lands which had been so selected were by the Act confirmed to the State.

The defendant in error was at the time of the passage of the last-mentioned Act a purchaser in good faith under the laws of the State of the lands in controversy. They had been selected by the State from

the public domain, and had been by her disposed of to him.

The history of defendant's acquisition of the land is as follows:

In 1853, one Stephen Franklin caused two school land warrants, Nos. 612 and 614, for 160 acres each, issued by the State of California to James T. Ewing, to be located by the County Surveyor of Santa Clara County, within which county the land lies. The lands were within the exterior boundaries of a tract of nearly 600 acres and were then at the time of the location in the possession of said Franklin. A substantial fence was around it. It was cultivated and improved during every year that Franklin and his successors resided there, and Franklin resided there until 1865. Over a corner of the tract in dispute was an avenue leading from Franklin's house to the Alviso road, and on it was an artesian well. Trees had also been planted along it, and within the enclosure stood a dwelling-house, barn and out-buildings. (Folios 58 and 59.)

The warrants were issued under the Act of the Legislature of California, approved May 3, 1852, concerning the disposal of the 500,000-acre grant to the State of Sept. 4, 1841. (U. S. Stat. at Large, Vol. 5, p. 453, Sec. 8.)

The Legislature had the power to direct the manner in which the land was to be selected by applicants. (Id., Sec. 8.)

The warrants were issued upon proper application and proceedings (folio 59) and there is no dispute but what they were in strict conformity with the provisions of the Act. The location was of 320 acres and in one body as required by Section 3 of said Act of May 3, 1852. (Stat. of Cal. 1852. p. 41.) They were run off by lines north and south, east and west and sufficiently designated by lines, distances and posts. (Transcript, pages 27, 28.)

The location secured to Franklin the right of possession (Sec. 5 of said Act of the Legislature); and thereafter in September, 1852, two certificates, issued by the County Surveyor, were given the said Franklin (folios 60–63), and were properly recorded. Further than this, the plat of the survey, including the above two mentioned land warrants and land warrant 615, was recorded in the County Surveyor's office, of Santa Clara County, Sept. 24, 1853. (Folio 68.) The plat of the survey follows page 30 of the Transcript. Duplicate certificates of location Nos. 612 and 614 were filed in the office of the Surveyor-General of the State. (Folio 68 and see Finding at folio 29.)

By Section 5 of this Act it was provided how and in what manner the purchaser should be secured in his location in case the survey by the County Surveyor did not conform to the lines of the Government survey as it might thereafter be run. The lines of the first survey were to be shifted onto the Government lines. (See Statute.)

The survey included the land in controversy and was capable of ascertainment. From the field notes, plat and certificates as above set forth, a witness, Surveyor Herrman, was able to relocate the survey. (Folio 69.) The survey gave bearings to objects which could not be mislocated. (Folio 70.)

No listing over to the State of these lands as part of the 500,000 acre grant was necessary.

"When the selection and location are once made, pursuant to the directions, of lands not reserved, but subject to location, the general gift of quantity becomes a particular gift of the specific lands located, vesting in the State a perfect and absolute title."

Bludworth *v.* Lake, 33 Cal., 261.

"No authority is given by the Act of Congress of September 4, 1841, to the Secretary of the Interior or any of the officers of the Land Department of the General Government to determine the regularity or sufficiency of locations given under this act, in selecting the land granted to the States." It especially provides that selections shall be made "in such manner as the Legislature thereof shall direct."

Megerle *v.* Ashe, 33 Cal., 83.

In order to perfect the title, it was therefore unnecessary for the United States to approve the location. But the title was confirmed by the United States by virtue of the Act of Congress of July 23, 1866, first alluded to in this brief. That the Act operated as a

grant *in præsenti*, and passed the title to the State, as of the date of the approval of the act, see the able reasoning of the Court as contained in its opinion. (Pages 45–46–47 Transcript.)

The purchase was made in good faith under the laws of the State, and the selection was from unappropriated lands of the public domain, and of lands not contained within any of the exceptions mentioned in the act.

All defects, if any, in his application, or in the location, were cured by the Act of March 27, 1872, passed "for the relief of purchasers of State lands." (Statutes of Cal., 1872, p. 587.)

James Donahue, the father of the defendant, in 1862 obtained all the right, title and interest of Stephen Franklin in and to said lands. This title was afterward acquired by the defendant by devise and descent from his father who died in 1864 or 1865. (Folio 29 and 30.)

Defendant's Lieu Land Title.

In 1862 James Donahue endeavored to obtain an additional title. The findings in regard to this title and of his actual possession of the lands, his cultivation and improvements, are at folios 31 to 35. As to the evidence see folios 71 to 86. The lands for which lieu lands were sought to be taken at that time, were and still are within the limits of a Mexican Grant. (Folio 32.)

"That application covered the land sued for in the complaint, and such application complied with the statutes under which it purported to be filed." (Folio 71.)

The statutes regulating such application are those of

April 23, 1858, Stat. of Cal., 1858, p. 248.
Feby. 18, 1859. Stat. of Cal., 1859, p. 33.
April 22, 1861, Stat. of Cal., 1861, p. 218.

Further than this the certificate of defendant (folios 75–8c) is *prima facie* proof of title, and could only be overcome by evidence showing that at the time of filing it, the land was in the adverse possession of the plaintiff or those under whom he claims. The record shows that defendant and his predecessors in right, title and interest have had possession since 1853, and plaintiff never had any possession. (Sec. 1925, C. C. P. of the State of Cal.)

See Wright *v.* Roseberry, 121 U. S., 517.

"The application was accompanied with the County Surveyor's Certificate of survey and location in statutory form." (Folio 71.) This was in strict conformity with the Act of April 22, 1861.

At the time of making this application, it was not necessary that the lands should have been surveyed by the United States. (Sec. 5 of Act of Apr. 22, 1861, Stat. p. 219.)

This act expressly authorized applications for lieu lands, etc., and sales to be made before the United States survey.

The land was accepted by the Locating Agent as lieu land, on the 27th day of March, 1862, and following the requirements of the last mentioned Act, the

Surveyor-General approved the same on July 28, 1862. The applicant thereafter paid the full purchase price of the lands, to wit: on January 20, 1864 (folio 80), and recorded his certificate of purchase April 3d, 1864. The date April, 1874, at folio 80, should be 1864. See the word "thereafter" in following line of Record.

In May, 1866, the land was surveyed under the authority of the United States, the plat was returned and filed in the United States Land Office of the proper district, and on May 30, 1866, the locating agent delivered his application to the Register of said land office, which was received and forwarded to the Commissioner of the General Land Office. (Folio 80.) It was, therefore, relocated in the name of the State on the last mentioned date.

This was before the passage of the Act of July 23, 1866, which confirmed these lands to the State. The State had made its selection; she had disposed of the same to a purchaser in good faith, and by virtue of the Act last cited, the lands as selected were confirmed to the State.

Wright *v.* Roseberry, 121 U. S., 512.

Her absolute right to a patent thereby became vested, and such right once vested is equivalent to a patent issued, as respects the dealing of the Government with public lands.

Stark *v.* Stark, 6 Wal., 402.

As was said by Justice Field in McCreery *v.* Haskell,

119 U. S., 331, "For selection of lands in California, in lieu of the school sections covered by Mexican grants, it has not been the practice of the Land Department to issue patents."

The defendant's apparent neglect in not obtaining a patent to himself should not militate to his injury.

Under the Curative Act of March 27, 1872, (Stats. 1872, page 587), as construed in Rowell *v.* Perkins, 56 Cal., 219–224. it would appear that no matter how defective may have been the application of the defendant for the lands in dispute, he, having made full payment therefor, and received his certificate of purchase, and this before any step had been taken by the plaintiff or his predecessor, was *vested* with the title of the State to said lands.

Any neglect of the Secretary of the Interior or other officer in Washington, to certify the lands over is of no consequence. The right of the State did not depend upon his action, nor could it be defeated by his delay.

Id., 121 U. S., 506.

The relocation was made after the United States survey and before any intervening rights had attached. It was long before the listing of the lands and the issuance of the patents under which the plaintiff claims. It secured the defendant the better right to the premises.

Young *v.* Shinn, 48 Cal., 26.

The State had sold the land twice to the defendant

in error. If she had not yet obtained the legal title, by virtue of the relocation and the confirmatory Act of July 23, 1866, she was bound in trust to the defendant to transfer it to him when she did get it. If it had not vested by reason of said location and the Act, it vested by the listing in 1874. And then it immediately inured to the benefit of the defendant.

The recital by the Commissioner that the listing over was under the Act of 1862, should be considered simply a mis-recital. He should have listed it under the Act of 1866.

"The listing operates to convey the title to the State as fully as by patent."

119 U. S., 331.
Middleton *v.* Lake, 30 Cal., 597.
Finney *v.* Berger, 50 Cal., 248.
Roberts *v.* Columbet, 63 Cal., 22.

The plaintiff in error, McNee, the subsequent grantee of the State, holds the legal title charged with the same trust, and equity will compel him to convey it.

Rector *v.* Gibbon, 111 U. S., 291.

On this point

See opinion of the Court in our case. Transcript, page 48.

The plaintiff and his predecessor had full notice of defendant's rights and interests in said land by reason of the latter's notorious and conspicuous occupation of

the same, and by reason of the extensive improvements. (Fol. 40.)

Further than this he had constructive notice of defendant's title by the records of the two certificates of the location of school land warrants, 612 and 614, (folio 61–63), and by the plat filed September 24, 1853. (Folio 68.)

In the certificate of the Commissioner who listed the lands to the State in 1874, under the College Grant, it was set forth that the same were approved and open to selection, subject, however, "to any valid interfering rights which may have existed at the date of selection." (Folio 51.) It was approved by the Secretary of the Interior, subject to the same rights. (Id.)

II.

The second assignment is virtually a portion of the first. In any case it has been answered in showing that that assignment has not been well taken.

III.

The decree that the plaintiff should deliver his conveyance to the defendant of all the premises in dispute was a just judgment founded upon the trial of the matters put in issue, and the facts proved. It was the relief sought by the defendant in his cross complaint. (Folio 18.) The question as to whether he should be compelled to convey was submitted to the Court for trial. It could not be termed an act depriving plaintiff of his property without due process of law.

The proceedings were in conformity with law. The plaintiff had appeared and submitted to the jurisdiction of the Court. In the action a transfer of the legal title could be ordered; or the enforcement of any rights under the patent could have been enjoined; or it could have been ordered cancelled.

13 Wal., 102–3.

See opinion in this case, Trans., p. 48.

IV.

As to the fourth assignment of error it is only necessary to say that the Court did *not* hold that the lands acquired under the Agricultural College Grant of July 2, 1862, must be used for other purposes than those specified in the Act. The Court held that the *land in dispute* passed to the State under the Act of 1866. It only expressed a doubt as to whether any trust was fastened upon the State by reason of the Agricultural College grant. Such determination as to the effect of the said grant was not necessary to the determination of the case. A decision as to the proper application of the funds derived from the sale could in no wise affect the question as to who is the owner of the land in controversy.

Even if the State Court had entered into the consideration of the disposal of these funds and decided erroneously, this Court would not be justified in reversing the judgment. The decision of this Federal

question would not dispose of the case or require its reversal.

Murdock *v.* City of Memphis, 20 Wal., 635.
The Victory, 6 Wal., 382.
Citizens Bank *v.* Board of Liquidation, 98 U. S., 140–2.

If the plaintiff insists, as he did in his brief filed in the Supreme Court of the State, that the lands could not have been selected at the time of the survey in 1866 as lieu lands, because of their being double minimum lands, it is only necessary to call the attention of the Court to the fact that they were not double minimum lands in 1866. The act in relation to such lands was not approved until March 6, 1868.

15 U. S. Stats. at Large, p. 39.

The plaintiff in error comes into this Court without an equity in his favor. The defendant and those under whom he claimed had occupied, cultivated and improved the land in dispute for twenty continuous years before the time (September 10, 1873), that the plaintiff's predecessor filed his application, and was at that time in possession of the same. Besides this he had taken all the necessary steps to procure title, and had his certificate for the same. And this occupation and our claim of title were known to the plaintiff. Despite these facts, he invested a few hundred dollars in a legal gamble for the title. If he has lost his money and been saddled with a trust in favor of the defend-

ant, this just result of the litigation must have been considered by him when he took the first step to acquire the possessions of the defendant, and he is not entitled to much commiseration.

Respectfully submitted,

PHILIP G. GALPIN,

WILBUR G. ZEIGLER,

Attorneys for Defendant in Error.

Dated November 21st, 1891.